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TABLE OF AUTHORITIES.

To be argued by

WALTER H. POLLAK and
WALTER NELLES.

Supreme Court of the United States

OCTOBER TERM, 1922.

BENJAMIN GITLOW, Plaintiff-in-Error, against PEOPLE OF THE STATE OF NEW YORK, Defendant-in-Error.	No. 770.

BRIEF FOR PLAINTIFF-IN-ERROR.

Statement of Facts.

This is a writ of error to review a judgment of the Court of Appeals of the State of New York affirming the conviction of Benjamin Gitlow for a statutory offense designated as criminal anarchy. The offense was held to have been committed by the publication on July 5, 1919, of a particular printed statement of doctrine without evidence of any concrete result flowing therefrom, and without evidence of the proximate likelihood of any such concrete result. The case brings to this Court

for the first time the question of the constitutionality of making advocacy *per se*, and without regard to circumstances, a crime. The federal point raised by exceptions in the record is that the statute and the authority exercised under it by the State of New York, deprived Gitlow of liberty without due process of law.

The provisions of the New York Penal Law (Secs. 160, 161) whose constitutionality and application are called in question are as follows:

> "160. Criminal anarchy defined. Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.
>
> 161. Advocacy of criminal anarchy. Any person who:
>
> 1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or
>
> 2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; * * *
>
> Is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both."

This statute was enacted in 1902.

The first count of the indictment charged the defendant with *advocating* the doctrine prohibited; the second with publishing a paper *containing* the doctrine.

The extent of the statutory prohibition, for the purposes of this case, is measured by the facts to which the statute was applied.

The printed statement of doctrine, the publication of which formed the basis of the defendant's conviction, was the so-called Manifesto of the Left Wing of the Socialist Party. It is set forth in full in the printed record (pp. 14-48). The doctrine of the Manifesto is candid advocacy of class government in the interests of the working class (dictatorship of the proletariat); it conceives such a result as the natural, and desirable, outcome of an inevitable process of evolution. The Manifesto does not advocate the fomentation of industrial disturbances; these are deemed to occur spontaneously from causes said to be inherent in the economic system. It is predicted that they will result in revolutionary mass strikes (Record, pp. 33, 39).

The two prevailing opinions in the Court of Appeals, *People* v. *Gitlow*, 234 N. Y. 132, characterized the Manifesto in the following language:

From the opinion of Crane, J. (Record, p. 109):

> "It will be seen from the above excerpts that this defendant through the manifesto of the Left Wing advocated the destruction of the state and the establishment of the dictatorship of the proletariat. The way in which this is to be accomplished is by the use of the mass strike."

Judge Crane went on to define "mass strike" as

> "the striking or the ceasing to work by concerted action of, and among, all working classes."

From the opinion of Hiscock, Ch. J. (Record, p. 119):

> "We think on the other hand that the jury were entirely justified in regarding it as a justification and advocacy of action by one class which would destroy the rights of all other classes and overthrow the state itself by use of revolutionary mass strikes."

Our contention is that the statute, prohibiting advocacy as such, without a showing of circumstances in which it is properly punishable, is unconstitutional. We do not therefore discuss the construction of the Manifesto. It may be noted, however, that the holding of the New York courts that the Manifesto contains not only the doctrine of substantive governmental change but also of unlawful means for accomplishing it, is accompanied by a recognition that the Manifesto contains no advocacy in specific terms of force and violence. The opinion adds that there need be no such advocacy (Record, p. 120). The holding is thus by its own terms a construction—by its own terms an inference from predictions of the Manifesto as to the probable development of forces and tendencies conceived as operating of their own accord. The Manifesto contains no plan for creating "mass strikes" or for any specific action. Its professed purpose is to win converts to its theory. Whether the proponents of such a theory of government could ever, with the most unlimited freedom of advocacy, win enough

converts to develop a possibility of carrying it into effect, and what particular program of specific acts, lawful or unlawful, they and their converts might adopt if and when they did, are matters of remote speculation. For the reasons stated, these matters are not relevant to this appeal.

The crucial fact for the purposes of this appeal is that the statute penalizes doctrine as doctrine without regard to consequences or to the proximate likelihood of consequences. The New York courts so construed it, holding that the admitted fact of the defendant's responsibility for the publication of the Manifesto was sufficient to sustain his conviction, without more. And the New York courts *had* so to construe it, for the record is wholly barren of evidence tending to show that any consequences of any sort flowed from the publication, or tending to show that the circumstances surrounding the publication were such as to make it likely that any consequences would flow therefrom. The agreed summary of the entire evidence will be found at pages 170-175 of the record.

The evidence and the concessions of fact made upon the defendant's behalf at the trial showed that the National Council of the so-called Left Wing of the Socialist Party had been directed to prepare a Manifesto by a conference held in New York City in June, 1919, and attended by some ninety persons from fourteen states; that the defendant was a member of this National Council; that 16,000 copies of a publication containing the Manifesto set out in the indictment had been ordered by the defendant, and were printed and delivered to him at the office of the Left Wing in New York City; that copies were wrapped up and mailed out from that office and that other copies were sold there. The indictment did not charge

and the proof did not show to what persons or to how many the Manifesto was distributed. The charge and the proof were merely that it was distributed "among divers people to the Grand Jury aforesaid unknown."

At the close of the evidence the defendant's counsel requested the Court to charge the jury, *inter alia*, as follows:

> "8. Unless you find that the defendant intentionally put into writing language reasonably and ordinarily calculated to incite certain persons to acts of force or violence, or to other acts of unlawfulness, with the object of overthrowing organized government, you must find the defendant not guilty under the first count of the indictment.
>
> 9. Unless you find that the defendant intentionally published or issued, or circulated with knowledge of the nature of the publication, language reasonably and ordinarily calculated to incite certain persons to acts of force or violence, or to other acts of unlawfulness, with the object of overthrowing organized government, you must find the defendant not guilty under the second count of the indictment" (Record, p. 164).

The Trial Justice, however, declined so to charge, saying:

> "I decline to charge that as requested, because of the uncertainty and indefiniteness of the language. 'Put into writing.' He may be equally responsible if he never touched a pencil or pen to paper. *I also refuse to charge it because it says 'language calculated to incite certain persons.' It makes no difference whether the language was calculated to incite, if the language did*

> *advise, advocate and teach the doctrine.* If a man tries to do it and his powers of expression are not such as will incite the person to whom he addresses his remarks, that is not his fault. He commits a crime when he advises it" (Record, p. 156).

The Court also declined to charge two other requests (the second and third) which, like the two already quoted, were based upon the doctrine of this Court in the Espionage Act and other cases that expression with relation to government is not in itself punishable—that although utterance or publication in circumstances involving a likelihood of substantive evil may be punished, an exercise of the right of free expression is not in itself a proper subject of punishment (Record, pp. 156, 164). Further, the Court, disregarding not only the principle that there must be likelihood of substantive evil but also the association of "unlawful means" in the statute with "force and violence," ruled that any advocacy not looking toward legislation or constitutional amendment would be advocacy of unlawful means (Record, p. 153). Although he later charged a request inconsistent with this ruling, he stated that he did so "with serious doubts" (Record, p. 156, cf. p. 208).

From the foregoing it is apparent that the Trial Court construed and applied the statute as penalizing doctrine *qua* doctrine, without regard either for the circumstances of its promulgation or for the likelihood of its bringing about an unlawful consequence. Upon this application of the statute the defendant was convicted and his conviction affirmed by both the Appellate Division and the Court of Appeals. Mr. Justice Laughlin, whose

opinion for the unanimous Appellate Division is the fullest discussion in any of the courts below, after citing the decisions of this Court in the cases involving the Espionage Act, said:

> "I am of opinion that the common law theory of proximate causal connection between the acts prohibited and the danger apprehended therefrom, which is the basis of the comments of the courts to which reference has been made, has no application here" (Record, p. 77).
>
> *People* v. *Gitlow*, 195 App. Div. 790.

There was no repudiation of this position in either of the majority opinions in the Court of Appeals.

In the Court of Appeals Judges Pound and Cardozo dissented upon the ground that the statute as passed in 1902 had reference to entirely different advocacies and conditions.

The constitutional question whether advocacy of doctrine as such may be made a subject of criminal prosecution is raised by exceptions to rulings assigned as error and was considered and passed upon adversely by the New York Court of Appeals. When the application for writ of error was presented to Mr. Justice Brandeis, it was referred to the full bench by reason of doubts arising from the manner in which the federal question appeared to have been raised by the defendant's trial counsel. The Court of Appeals then amended its remittitur to show that the federal question had in fact been considered and passed upon (Record, pp. 135-136), and upon the record as thus amended the full bench of this Court granted a writ of error (Record, pp. 165-166).

Specification of Errors.

1. The Trial Court erred in overruling the objection of the defendant's counsel to the taking of any evidence under the indictment, and in overruling his motions at the close of the evidence to dismiss the indictment and direct an acquittal, upon the grounds that the statute under which the indictment was framed contravenes the provision of the Fourteenth Amendment to the Constitution of the United States that no State shall deprive any person of life, liberty or property without due process of law, and that the indictment did not charge and the evidence did not show an offense.

2. The Trial Court erred in refusing the defendant's second, third, eighth and ninth requests to charge (quoted or summarized on pages 6 and 7).

Assignment of Errors, Record, pp. 139-143 (cf. Record, pp. 171, 175, 156).

Outline of Argument.

We shall develop our contentions in the following order:

I. The "liberty" protected by the Fourteenth Amendment includes the liberty of speech and of the press.

II. The New York statute unduly restrains libery of expression. That liberty is not absolute. It may be restrained, however, only in circum-

stances where its exercise bears a causal relation with some substantive evil, consummated, attempted or likely. The New York statute takes no account of circumstances, and is, therefore, under the settled principles of the subject, unconstitutional.

III. The New York statute rests upon principles of the old common law, which the modern law of England has repudiated in favor of principles in harmony with those of this Court.

IV. The doctrines of the older English common law which the New York statute attempts to revive, are doctrines which never maintained themselves in America. They are inconsistent with the theory of rights and liberties upon which American government rests, and to which the Fourteenth Amendment gave the protection of the Federal Constitution.

V. The New York statute rests upon the same principle as the Federal Sedition Law of 1798—a principle which this Court and every department of the government subsequently condemned.

VI. The New York statute is invalid under the general principles of the law of due process.

POINT I.

The "liberty" protected by the Fourteenth Amendment includes the liberty of speech and of the press.

Liberty of expression is a right which the due process clause protects against state action. This is established (a) by the authoritative determinations of the meaning of "liberty" as used in the Fourteenth Amendment; (b) by the assumptions of this Court in dealing with the precise question; and (c) by its explicit declaration with respect to the related right of free assemblage.

(a) In *United States* v. *Cruikshank*, 92 U. S. 542, 554, this Court said that the Fourteenth Amendment

> "furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society."

"The fundamental rights which belong to every citizen as a member of society" must include the right of expression—particularly the right of expression upon the problems of society and citizenship.

In *Allgeyer* v. *Louisiana*, 165 U. S. 578, Mr. Justice Peckham thus defined liberty, at page 589:

> "The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen

> to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

The "liberty" which may not be invaded without due process of law includes the "inalienable rights" formulated under the phrase "pursuit of happiness" (and no less clearly under the word "liberty" also) in the Declaration of Independence. And this the Court noted in

> *Butchers' Union Company* v. *Crescent City Company,* 111 U. S. 746, 762; quoted and approved in *Allgeyer* v. *Louisiana, supra.*

By these definitions "the right to follow any of the common occupations of life" may not be arbitrarily infringed. The liberty of contract itself is protected not merely as a right of property but as "included in the right of personal liberty."

> *Coppage* v. *Kansas,* 236 U. S. 1, 14.

To the same effect as the declarations of this Court are many definitions of liberty by State Courts of last resort.

> "These terms, 'life,' 'liberty,' and 'property,' are representative terms and cover every right to which a member of the body politic is entitled under the law. Within their comprehensive scope are embraced the

right of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrests, the right to buy and sell as others may—all our liberties—personal, civil, and political; in short, all that *makes life worth living;* and of none of these liberties can anyone be deprived, except by due process of law * * *." (Italics the Court's.)

State v. *Julow,* 129 Mo. 163, 172.*

"The word 'liberty,' as thus employed in the Constitutions and understood in the United States, is a term of comprehensive scope. It embraces not only freedom from servitude and from imprisonment and arbitrary restraint of person, but also all our religious, civil, political, and personal rights."

Sol Block and Griff v. *Schwartz,* 27 Utah 387, 396.

To the same effect are the definitions by the text writers. Judge Cooley, writing of the Fourteenth

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* As a result of the inclusion of free speech clauses in all modern State Constitutions, the State Courts have not found it necessary to decide that the right of expression is protected by the due process principle. The point was involved in the debates of the New York State Constitutional Convention of 1821 relating to the adoption of a bill of rights. The State Constitution of 1777, at that time in effect, contained none of the customary bill of rights provisions except a *due process* clause and a provision that no power should be exercised over the people "except such as shall be derived from and granted by them." The opinion was frequently expressed, and never challenged, that though an explicit bill of rights might be desirable, it was not necessary; as the people had never granted a power to abridge their inherent rights of free press, free assemblage, and the like, those rights were safe without explicit declaration (*Debates, New York Constitutional Convention of 1821,* Albany, 1821, speeches of Chief Justice Spencer, Martin Van Buren, General Tallmadge, and others, pp. 163, 168, 171, 172).

Amendment in the fifth edition of *Story's Commentaries* (Vol. 2, p. 697), says:

> "It should be observed of the terms 'life,' 'liberty,' and 'property,' that they are representative terms, and are intended and must be understood to cover every right to which a member of the body politic is entitled under the law. * * * The word 'liberty' here employed implies the opposite of all those things which, besides the deprivation of life and property, were forbidden by the Great Charter. In the charter as confirmed by Henry III, no freeman was to be seized, or imprisoned, or deprived of his liberties or free customs, or outlawed or banished, or any ways destroyed, except by the law of the land. * * * The guarantee is the negation of arbitrary power in every form which results in a deprivation of right. * * * *It would be absurd, for instance, to say that arbitrary arrests were forbidden, but that the freedom of speech, the freedom of religious worship, the right of self-defence against unlawful violence, the right freely to buy and sell as others may, or the right in the public schools, found no protection here.*" (Italics ours.)

To the same effect is the discussion by Mr. Freund, which is so full that we do not quote it here, although extracts will appear in their appropriate connection below. He agrees with Judge Cooley that the Fourteenth Amendment protects all the fundamental rights of the individual, and adds that certain of these fundamental rights—freedom of religion, of speech and press, and of assembly—are singled out as withdrawn from the exercise of the police power in the sense that their exercise cannot, in itself, be regarded as of public

danger (Sec. 445, p. 475). Writing in 1904, he discussed the New York Criminal Anarchy Law and concluded that it was unconstitutional insofar as it penalized the mere exercise of the right of free expression.

Freund, The Police Power, Sec. 478, p. 513.

(b) This Court, without explicitly deciding the point, has in three cases rendered decisions upon the assumption that the liberty of speech and press is included in the liberty protected by the Fourteenth Amendment.

In *Patterson* v. *Colorado,* 205 U. S. 454, the Court left undecided "the question whether there is to be found in the Fourteenth Amendment a prohibition similar to that in the First," but went on to decide the real issue, whether the punishment for a verbal contempt of court there involved was not a deprivation of liberty without due process of law. Mr. Justice Harlan, dissenting on grounds not here material, said:

> "* * * the privileges of free speech and of a free press, belonging to every citizen of the United States, constitute essential parts of every man's liberty, and are protected against violation by that clause of the Fourteenth Amendment forbidding a State to deprive any person of his liberty without due process of law."

In *Fox* v. *Washington,* 236 U. S. 273 (more fully discussed in Point II), jurisdiction was claimed and taken upon the ground that the State statute there in question abridged the liberty of the press without due process of law contrary to the Four-

teenth Amendment. The question was of punishment for language used in such circumstances as to create imminent danger of overt criminal acts. This Court, suggesting no doubt as to its jurisdiction, passed upon the main point in a manner clearly implying that, had the State statute been construed by the Court below as applicable to facts analogous to those in the case at bar, the statute would have been held unconstitutional.

In *Gilbert* v. *Minnesota,* 254 U. S. 325 (also more fully discussed in Point II), the Court, at page 332, assumed for the purposes of the case the correctness of the claim that a question of deprivation of liberty of speech without due process of law was before it, resting its decision upon the ground that the State had power to punish the language used in the circumstances shown. Mr. Justice Brandeis, dissenting on other grounds, used (p. 343) language similar to that of Mr. Justice Harlan in *Patterson* v. *Colorado, supra.*

In our application for writ of error in this case we pointed out, and we assume from the granting of the writ that this Court agreed, that Mr. Justice Pitney's expressions in *Prudential Insurance Company* v. *Cheek* (U. S. , Advance Opinions, June 5, 1922) did not apply to the instant question. That case involved the constitutionality of a statute requiring a corporation, on request of an ex-employee, to issue a "service letter" setting forth the nature and duration of his employment and the cause of its termination. The employer claimed a "liberty of silence." Mr. Justice Pitney declared against this contention. A primary ground of decision was that the statute applied only to corporations, whose right to do business in a State may

be made subject to conditions reasonably deemed expedient.

(c) The right of assembly is in its purpose and policy like the right of free speech. The rights are different aspects merely of a single general right of free expression (cf. *Neeley* v. *Farr*, 61 Colo. 485, especially the quotation from Senator Thomas' brief at p. 510; *State* v. *Junkin*, 85 Neb. 1, 3-4). The First Amendment to the Federal Constitution joins the two rights in a single sentence.

In *United States* v. *Cruikshank*, 92 U. S. 542 (quoted and approved in *Twining* v. *New Jersey*, 211 U. S. 78, 96-97), this Court declared that the Fourteenth Amendment protects the right of assembly from State interference, saying at page 551:

> "The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It 'derives its source,' to use the language of Chief Justice Marshall, in *Gibbons* v. *Ogden*, 9 Wheat 211, 'from those laws whose authority is acknowledged by civilized man throughout the world.' It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution. *The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection.*"

And at page 554:

> "The Fourteenth Amendment * * * furnishes an additional guaranty against any

> encroachment by the States upon the fundamental rights which belong to every citizen as a member of society."

The rights of free speech and press must have equal standing and protection.

In deciding whether a right is protected under the due process clause, the question, as was said in *Twining* v. *New Jersey*, 211 U. S. 78, 106, is this:

> "Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government?"

With respect to freedom of opinion and expression on matters of public concern, the question can be answered in only one way.

POINT II.

The New York statute unduly restrains liberty of expression. That liberty is not absolute. It may be restrained, however, only in circumstances where its exercise bears a causal relation with some substantive evil, consummated, attempted or likely. The New York statute takes no account of circumstances, and is, therefore, under the settled principles of the subject, unconstitutional.

Liberty of expression has two aspects—private and public. Man is a free agent to use his tongue and pen, as he may use his brain and body generally, for his own benefit or harm in the conduct of his private affairs. If he hurts another, or comes dangerously near it, he is answerable. He is answerable for a personal libel, both civilly and criminally, as he is answerable for a blow. He may not ride his bicycle on a city sidewalk, even under particular circumstances where his so doing entails no actual danger. For against his merely private interest lies the general interest in the safety of the streets, which warrants punishment for even a harmless particular exercise of his private liberty of locomotion. Similarly, he may not utter obscenity or sell stock by a false prospectus; his films or his mail matter may even be censored in advance to prevent his doing so.

The citizen's liberty to take part in public affairs stands on another and broader footing. His exer-

cise of his right is free not only in his own interest but in the interest of the whole community. It is not for his benefit alone that he is permitted to express his views of law, government and politics, and propose his remedies. His views may be silly, his remedies preposterous. Their mere utterance creates some danger that unthinking members of the community may undertake to act upon them. But he is not to be punished either for their foolishness or for the danger incident to mere utterance—for the danger inherent in the doctrines themselves, as distinct from a danger arising from their utterance in particular circumstances. The citizen has a right to express, for the State may have an interest in hearing, any doctrine. Free government is premised upon the proposition that no human agency other than the ultimate good sense of the whole community can be trusted with power to gauge the dangerous tendency of mere expression of political doctrine. The utterance even of dangerous folly may be a valuable index of the need of wisdom. Folly may suggest wisdom. The liberty of opinion and expression which is essential to free government and which the Constitution protects, is thus an immunity from prosecution because of the intrinsic quality of the ideas expressed.

The liberty even of public expression is not unlimited license; and this Court has both recognized the principle and stated the limits. When there occurs a substantive evil which the Legislature has a right to prevent, the speaker of language which caused it may be punished. Again, when a substantive evil is attempted, it is no defense for a person involved in the attempt that his only act was verbal, and that his words expressed an

idea or proposal relating to government. Finally, a person who utters words in circumstances creating a clear and present danger of such substantive evil, or directly tending to bring it about, may be punished.

> *Fox* v. *Washington*, 236 U. S. 273.
> *Schenck* v. *United States*, 249 U. S. 47.
> *Debs* v. *United States*, 249 U. S. 211.
> *Frohwerk* v. *United States*, 249 U. S. 204.
> *Abrams* v. *United States*, 250 U. S. 616.
> *Schaefer* v. *United States*, 251 U. S. 466.
> *Pierce* v. *United States*, 252 U. S. 239.
> *Gilbert* v. *Minnesota*, 254 U. S. 325.

We shall show in the course of the following argument (a) that this, in substance, is the limit set by this Court to the power of the State to punish the utterance of political doctrine: there must be a causal connection between the utterance and a substantive evil, consummated, attempted, or likely. We shall then show (b) that the New York Criminal Anarchy Law, as construed in this case, is inconsistent with this limitation, and far oversteps it, and (c) that the New York courts have admitted this inconsistency and disregarded it.

(a) *The doctrine of this Court.*

In *Schenck* v. *United States* this Court said—and its reference to "every case" shows that it was declaring a fundamental general principle:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent" (249 U. S. at p. 52).

The *Schenck* case was the first case in this Court under the Espionage Act and was designed to settle the law on the subject. That decision was followed a week later by *Debs* v. *United States,* in which this Court, affirming the conviction of the defendant, pointed out that

> "• • • the jury were most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service" (249 U. S. at p. 216).

The charge to the jury approved in the *Debs* case is in the form of words frequently used by the Courts to express the limit of the power to punish utterances of doctrine. We believe the implications of the phrase here employed—"natural tendency and reasonably probable effect"—to be identical with those of the statement of the law in the *Schenck* case. Both express the purpose of this Court to apply to this question the legal principle of causation—the requirement that there be a causal connection between the act sought to be punished and a substantive evil—that test "of proximity and degree" illustrated in the criminal law of attempts, and elsewhere (*Commonwealth* v. *Peaslee,* 177 Mass. 267, 272; *Swift & Co.* v. *United States,* 196 U. S. 375, 396).

The boundary of the field protected in the name of liberty of speech in the *Schenck* and *Debs* cases had previously been marked out by this Court. In *Fox* v. *Washington,* 236 U. S. 274, the Court had before it a statute purporting, like the New York

Criminal Anarchy Law, to control utterances of offensive doctrine. The Act made it a crime to publish any writing

> "* * * advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of any crime, breach of the peace or act of violence, or which shall tend to encourage or advocate disrespect for law or for any court or courts of justice, * * *."

It is to be noted that this statute punishes writings advocating, and writings tending to advocate, certain doctrines. It will assist in defining the implications of the rule of causation laid down in the *Schenck* and *Debs* cases to observe the narrow grounds on which alone this Court admitted the Washington statute to be constitutional.

Fox had been convicted under the Washington law for the publication of an article entitled "The Nude and the Prudes." This article was addressed to the members of a colony called "Home," which had been erected, as the article declared,

> "* * * to escape the polluted atmosphere of priest-ridden, conventional society * * *."

The article explained that in Home

> "* * * one of the liberties enjoyed * * * was the privilege to bathe in evening dress, or with merely the clothes nature gave them, just as they chose."

Some neighbors had procured the conviction of members of the colony for violating the laws against indecent exposure; and Fox's article advocated a boycott of these neighbors

> "until these invaders will come to see the brutal mistake of their action * * *."

Thus, as this Court commented,

> "* * * by indirection, but unmistakably the article encourages and incites a persistence in what we must assume would be a breach of the state laws against indecent exposure; * * *."

The State Court had sustained the constitutionality of the Act upon broad grounds (*State* v. *Fox*, 71 Wash. 185). This Court made clear that it did not adopt these broad grounds. The circumstances surrounding the publication appeared, and were as follows: There were immediately present a group of persons to whom the article was addressed, who were engaged in acts violative of a criminal statute, and whom the article encouraged in a persistent continuation of that course. In sustaining the Act, this Court related the utterance to these circumstances in such a manner as to show that it was only in their light that the publication could constitutionally be punished:

> "We understand the state court by implication at least to have read the statute as confined to encouraging an actual breach of law."

Again:

> "It does not appear and is not likely that the statute will be construed to prevent publications merely because they tend to produce unfavorable opinions of a particular statute or of law in general" (*Fox* v. *Washington*, 236 U. S. at p. 277).

This Court was careful to add:

> "If the statute should be construed as going no farther than it is necessary to go in

> order to bring the defendant within it, there is no trouble with it for want of definiteness."

And it showed in the same opinion how far—and "no farther"—the State might go:

> "In this present case the disrespect for law that was encouraged was disregard of it—an overt breach and technically criminal act."

In these three cases this Court established the principle that guilt may not rest upon the fact of publication alone—upon danger inherent in the quality of the words used. It is in the light of surrounding circumstances that the danger of publication is to be tested.

In the Espionage Act cases, the extrinsic circumstance of fundamental importance was the war.

> "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."
>
> *Schenck* v. *U. S.*, 249 U. S. 47, 52.

The influence of this circumstance was thus expressed by Mr. Justice Sutherland: "Everything" that the citizen

> "has, or is, or hopes to be—property, liberty, life—may be required. In time of peace, an attempt to interfere with the least of these would be, and ought to be, resisted to the utmost. In time of war, when the Nation is in deadly peril, every freeman, who prizes

the boon of *enduring* liberty, will lay them all, freely and ungrudgingly, upon the sacrificial altar of his country.

And so, freedom of speech may be curtailed or denied, in order that the morale of the population and the fighting spirit of the army may not be broken by the preachers of sedition; freedom of the press interfered with, in order that our military plans and movements may not be made known to the enemy; * * * property of alien enemies lawfully in the country and normally under the protection of the Constitution, seized without judicial process and converted to the public use without 'due process of law'; * * * and a multitude of other powers, the exercise of which in time of peace would be intolerable and inadmissible, may be employed, by or under the direction of Congress, to meet the necessities and emergencies of war."

Sutherland, Constitutional Power and World Affairs (1919), 98, 99.

War is "the emergency that makes it immediately dangerous to leave the correction of evil counsels to time" (Holmes, J., in *Abrams* v. *United States*, 250 U. S. at pp. 630-631). War is itself the greatest of circumstances and one that may sharpen the significance of specific incidents surrounding publication. Even in war circumstances of danger, actual, attempted or likely, must appear, and the Espionage decisions—once the principles were settled—involved primarily an analysis of the circumstances of publication.

In the first of the Espionage Act cases, Schenck and his co-defendants had mailed to men who had passed exemption boards circulars which not only

declared conscription to be unconstitutional, but urged the recipients "in impassioned language" to assert their rights. How vital this Court deemed the circumstances appears from its opinion:

> "We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights" (*Schenck* v. *United States,* 249 U. S. at p. 52).

In the *Frohwerk* case (249 U. S. 204) analysis of circumstances was impossible because there was no bill of exceptions. The Court recognized (at p. 208) that what was said might have been said even in time of war "in circumstances that would not make it a crime"; but, since no statement of the evidence had been included in the record, found it impossible to say that the circulation was not "in quarters where a little breath would be enough to kindle a flame." In the *Debs* case it was held that if the defendant's abstract opposition to war was intended to obstruct recruiting, and "if, *in all the circumstances,* that would be its probable effect," it was not constitutionally protected (249 U. S. at p. 215). In the *Sugarman* case (249 U. S. 182) the circumstances were similar to those in the *Schenck* case—an anti-draft speech at a meeting attended by many registrants under the Selective Service Act.

The true quality of the analysis of circumstances is also illustrated in the later cases under the Espionage Act. In each case the question was "of proximity and degree" (*Schenck* v. *U. S., supra*), and it was answered by that process of inclusion and exclusion with which this Court has resolved many problems of constitutional power.

Abrams v. *United States,* 250 U. S. 616, is a step in this process of definition; the members of the Court differed, the majority voting for inclusion, the minority for exclusion. The majority expressly adopts the statement of the law in the *Schenck* case:

> "This contention" [that the Espionage Act violates the First Amendment] "is sufficiently discussed and is definitely negatived in *Schenck* v. *United States* and *Baer* v. *United States,* 249 U. S. 47; and in *Frohwerk* v. *United States,* 249 U. S. 204" (250 U. S. at p. 619).

The emphasis upon the circumstances of the publication is quite as marked in the *Abrams* case as in the *Schenck* case. Abrams' pamphlets were not merely issued in war time, but were

> "circulated in the greatest port of our land, from which great numbers of soldiers were at the time taking ship daily, and in which great quantities of war supplies of every kind were at the time being manufactured for transportation overseas, * * *" (250 U. S. at p. 622).

The *Schaefer* case (251 U. S. 466) is like the *Abrams* case. The majority and minority of the Court were in express accord upon the law; both the majority (251 U. S. 477) and Mr. Justice Brandeis in his dissent (*ibid,* p. 482) cite the *Schenck* case as settling the law of the subject. The disagreement between majority and minority in this case, as in the *Abrams* case, was on the question whether the circumstances were such as to warrant submission to the jury of the issue of danger of substantive evil. Weight was given to evidence

that the defendants had wilfully garbled news despatches before publication (pp. 473, 481).

In the *Pierce* case (252 U. S. 239) also there was no disagreement as to the law as settled in the *Schenck* and *Debs* cases. The defendants had distributed anti-war circulars on door-steps. The majority (through Mr. Justice Pitney), citing these cases, reiterated the rule that

> "Whether the printed words would in fact produce as a proximate result a material interference with the recruiting or enlistment service, or the operation or success of the forces of the United States, was a question for the jury to decide *in view of all the circumstances of the time and considering the place and manner of distribution*" (252 U. S. at p. 250).

In the latest of the war time cases (*Gilbert* v. *Minnesota*, 254 U. S. 325), a State statute was involved. Gilbert was convicted under the Minnesota law (Laws of 1917, Chap. 463), making it unlawful

> "for any person to teach or advocate by any written or printed matter whatsoever, or by oral speech, that the citizens of this state should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States."

Gilbert had made a speech before a crowd of several hundred persons. The Court notes and states the circumstances in which the speech was made. It

> "was resented by his auditors. There were protesting interruptions, also accusations and threats against him, disorder and intimations of violence" (254 U. S. at p. 331).

The State Court had dismissed the constitutional objection with a sentence (*State* v. *Gilbert,* 141 Minn. 263), referring to *State* v. *Holm,* 139 Minn. 267, and following cases, as conclusive of the constitutionality of the statute.

A reference to the *Holm* case shows that the grounds on which the State Court upheld the statute were as sweeping as those of the Supreme Court of Washington in *State* v. *Fox, supra.* But in the *Gilbert* case, as in the *Fox* case, there is a sharp contrast between the broad acceptance of the statute by the State Court and the manner in which this Court related the expression to the circumstances of utterance:

> "On such occasions feeling usually runs high and is impetuous; there is a prompting to violence and when violence is once yielded to, before it can be quelled, tragedies may be enacted. To preclude such a result or a danger of it is a proper exercise of the power of the State" (254 U. S. at pp. 331-332).

The Espionage Act cases and the others here reviewed establish this as the doctrine of this Court: that in order constitutionally to extend the police power or a Federal power limited on like principles, to the suppression of the utterance of political opinion, something more must be shown than knowing and intentional publication or utterance. The expression must be attended by circumstances presenting a "clear and present danger of substantive evil," or making such a result "reasonably probable." Whichever way the rule be stated, it is a rule requiring that there be a causal connection between the utterance condemned and a substantive evil.

This rule necessarily implies that advocacy of doctrine may not in itself be a subject of punishment. It may be punished only in circumstances which give it the quality of incitement to crime.

Mr. Wharton, approaching the subject from the point of view of the law of crimes, states in other terms the distinction which this Court applied. The use of language,* he says, may be a subject of indictment (1) where it is an inducement to commit crime—that is, where circumstances give it the quality of incitement; or (2) where it actually amounts to or is a stage toward an independent consummated offense. Language itself, apart from criminal effect or utterance in dangerous circumstances, cannot constitutionally be punished; for otherwise,

> "the propagandists, even in conversation, of agrarian or communistic theories, are liable to criminal prosecutions; and hence the necessary freedom of speech and of the press will be greatly infringed."
>
> 1 *Wharton Crim. Law,* 11 Ed., 278.

Mr. Wharton's illustrations suggest three classes of situations in which the use of language may be punishel: (1) Utterance may be punished when it of itself inflicts an injury, as in the case of personal libels. (2) Utterance may be punished when it in fact leads to an injury; as when A counsels B to commit an assault, and the assault is actually committed. (3) Utterance may be punished when it has the quality of incitement.

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* Mr. Wharton uses the phrase "solicitations to commit crime," but does not limit "solicitations" to its technical meaning in criminal law.

It may have this quality in a considerable variety of circumstances; it cannot have it altogether independently of circumstances. Thus, to approve assault in a soliloquy is not a crime. But express inducement of another to commit an assault may be punished if it was seriously intended or understood and addressed to a person who might be excited to action. More circumstances are necessary to support a conclusion that indirect suggestions or abstract observations amount to an incitement. Language, as Hamilton pointed out (see quotation *infra*, p. 93), may be harmless in one set of circumstances, incendiary in another. Circumstances may show, but only circumstances can show, the true meaning of ironic praise, which may, in a particular setting, constitute a libel or a criminal incitement. Personal abuse of an individual may be mere rhetoric; but its insinuation in the ear of his enemy might amount to incitement to assault. If circumstances were left out of account and punishment were for mere utterance, it would amount to punishment for speculative possibilities. Such punishment would be unconstitutional; the danger of criminal result must be reasonably definite and certain.*

It is because so little beyond the mere use of the language—its bare communication to someone likely to act—is required to show the criminality of an utterance of *direct incitement* to violence (such as advocacy of assassination or assault) that a statute which expressly directs its prohibition against such utterances may be valid. But crim-

* Compare, for example, *Swift & Co.* v. *United States*, 196 U. S. 375, 396; *Waters Pierce Oil Co.* v. *United States*, 212 U. S. 86, 109; *Collins* v. *Kentucky*, 234 U. S. 634, 637.

inality even here lies in relation to *consequences* rather than in the mere fact of utterance; and a valid statute should rather prohibit a result or dangerous approach to it than utterance itself. Thus the Espionage Act prohibited results—such as obstruction of the recruiting service. The ban of the statute was not upon the use of language as such; but it was no defense, where an act did in fact naturally obstruct the recruiting service, that that act was an utterance which in itself apart from circumstances would be immune from prosecution. (See *Schenck* v. *United States, supra,* at p. 52.)

This principle of immunity of language *per se*—especially language relating to law and government—was also stated, even before the decisions of this Court under the due process clause (*Fox* v. *Washington* and *Gilbert* v. *Minnesota, supra*) and the First Amendment (Espionage Act cases, *supra*), by Mr. Freund, approaching the subject not from the side of the law of crimes but from that of the law of due process and the police power. The New York Criminal Anarchy Law was passed in 1902. Mr. Freund wrote in 1904. Considering the New York statute from the point of view of this principle, he concluded that the statute (except in its relation to advocacy of assassination, with which Gitlow is not charged, and which might be held without special circumstances to have the quality of incitement) was unconstitutional.

(b) *The New York Criminal Anarchy Law in the light of the doctrine of this Court.*

The New York statute, as Mr. Freund perceived long before it came before the courts, disregards on its face the constitutional principles above set

forth. It does not punish incitement. It punishes the mere utterance—"advocacy"—of certain doctrines, whether or not such utterance was reasonably calculated to persuade persons to the acts condemned, or to any unlawful conduct whatever, and whether or not a causal connection between the utterance and a substantive evil can be deduced from surrounding circumstances.

The language of the statute calls for such a construction. The New York Courts so construed it, and *had*, upon this record, so to construe it, for the record is wholly barren of evidence of the circumstances of dissemination (see pp. 5-8, *supra*). And the New York Courts, as we shall see, coupled their holding of its validity with an express repudiation of the principle of causation laid down by this Court in the decisions we have analyzed.

Mr. Freund states the principles as follows:

> "A proposition to forbid and punish the teaching or the propagation of the doctrine of anarchism, i. e., the doctrine or belief that all established government is wrongful and pernicious and should be destroyed is inconsistent with the freedom of speech and press, unless carefully confined to cases of solicitation of crime, which will be discussed presently. As the freedom of religion would have no meaning without the liberty of attacking all religion, so the freedom of political discussion is merely a phrase if it must stop short of questioning the fundamental ideas of politics, law and government. Otherwise every government is justified in drawing the line of free discussion at those principles or institutions, which it deems essential to its perpetuation—a view to which the Russian government would subscribe. It is the

essence of political liberty that it may create disaffection or other inconvenience to the existing government, otherwise there would be no merit in tolerating it. This toleration, however, like all toleration, is based not upon generosity, but on sound policy; on the consideration, namely, that ideas are not suppressed by suppressing their free and public discussion, and that such discussion alone can render them harmless and remove the excuse for illegality by giving hope of their realization by lawful means.

Freedom of speech finds, however, its limit in incitement to crime and violence. By the principles of the common law, the procurement of crime is in itself a criminal act, and a conspiracy to commit a crime is criminal though the end is never accomplished or even undertaken. The prohibition of acts punishable at common law is of course within the constitutional power of the state governments. Therefore a statute may validly forbid all speaking and writing the object of which is to incite directly to the commission of violence and crime."

Freund, The Police Power, Secs. 475-476, pp. 509-510.

And, applying these principles to the New York statute, he concludes:

"In accordance with the principles above set forth the constitutional guaranty of freedom of speech and press and assembly demands the right to oppose all government and to argue that the overthrow of government cannot be accomplished otherwise than by force; and the statutes referred to, in so far as they deny these rights, should consequently be considered as unconstitutional."

Freund, The Police Power, Sec. 478, p. 513.

The distinction drawn by Mr. Freund between valid and invalid legislation is clearly the same which Mr. Wharton deduced from his study of the whole field of crime and which this Court recognized and applied in the decisions we have analyzed. To restate it once more: A statute is constitutional which prohibits incitement to crime; a statute is unconstitutional which prohibits the advocacy of doctrines. The distinction between incitement and advocacy is plain. Incitement speaks in the imperative; advocacy in the conditional. Only circumstances can transform advocacy into incitement. The right to advocate theories of government, sound or unsound, is larger than the merely private liberty of faculty and function; its abridgement cramps not only the thought of the individual, but that of the whole community. As Mr. Freund points out, it is "merely a phrase" if it cannot go to the length of opposing the most fundamental institutions and intimating the opinion that unlawful collective means are necessary for their alteration. Any danger which the mere existence and exercise of such a right may in itself involve, must, under our Constitution, be tolerated. Against such danger, as distinct from the danger inherent in surrounding circumstances, the good sense of the community is a sufficient safeguard.

(c) *Disregard of constitutional principles by the New York Courts.*

The New York Courts in this case perfectly recognized, and disregarded, the inconsistency between the statute which they sustained and these principles; they held advocacy punishable without circumstances giving it the character of incitement.

This is shown both by rulings denied and rulings made.

The Trial Court, squarely holding that the issue was of advocacy only, refused requests to charge (p. 6, *supra*) obviously derived from the principles of the Espionage Act cases and designed to present to the jury an issue of tendency to incite unlawful action. In this the New York appellate courts found no error.

The opinion of the unanimous Appellate Division, after citing the Espionage Act cases and stating their principles, flatly held them inapplicable:

> "The courts in construing such statutes have in some instances said that the danger to be apprehended from a doctrine, the advocacy of which is lawfully and constitutionally forbidden, must be present or immediate (*Schenck* v. *U. S., supra; Masses Pub. Co.* v. *Patten,* 244 Fed. Rep. 535, reversed 246 Fed. Rep. 24; *Colyer et al.* v. *Skeffington,* 265 Fed. Rep. 17); and in other decisions it is stated that a question of proximity and degree is involved, and that the 'natural tendency and reasonably probable effect' of the words used must be to accomplish the evil which it is the purpose of the statute to guard against (*Debs* v. *United States,* 249 U. S. 211; *Commonwealth* v. *Peaslee,* 177 Mass. 267; *Abrams* v. *United States,* 250 U. S., dissenting opinion by Mr. Justice Holmes at p. 627; *Schaefer* v. *U. S.,* 251 U. S. 466; *Pierce* v. *U. S.,* 252 U. S. 239).
>
> "I am of opinion that the common-law theory of proximate causal connection between the acts prohibited and the danger apprehended therefrom, which is the basis of the comments of the courts to which reference has been made, has no application here"

(*People* v. *Gitlow,* 195 App. Div. 790; Record, pp. 76-77).

And again:

> "I cannot subscribe to the doctrine that it is not competent for the Legislature to forbid the advocacy of such a doctrine designed and intended to overthrow government in this manner, until it can be shown that there is a present or immediate danger that it will be successful.† * * * If they (laws for the preservation of state and nation) are reasonably adapted to that end and are based on danger reasonably to be apprehended, even though not present or immediate, they may not be annulled by the courts * * *" (*People* v. *Gitlow, supra,* pp. 790-792; Record, p. 77).

The majority of the Court of Appeals affirmed the decision of the Appellate Division and did not reject the reasoning upon which it was based. The statements above quoted show alike the agreement of the New York Courts with Mr. Freund's construction of the statute as an *advocacy* statute pure and simple, and the departure from accepted constitutional principles by which alone the conviction could be sustained. The Appellate Division went so far as to say that the objection to the statute under the due process clause did not raise a question of legislative power to enact such a stat-

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† It was not claimed either in the appellate courts or in the requests to charge which were denied at the trial (p. 6, *supra*) that there must be a danger that government will in fact be overthrown. The requests to charge contemplated submission to the jury of the question whether the publication was "reasonably and ordinarily calculated to incite * * * acts of unlawfulness"—which might, of course, fall far short of endangering government.

ute, but only whether the statute undertook to dispense with some procedural requirement essential to due process of law:

> "Manifestly the argument based on lack of due process needs no extended consideration, for he has had and is having due process of law which entitles him to a hearing and determination by a court of competent jurisdiction" (197 App. Div. at p. 733; Record, p. 71).

This is answered by a host of decisions by this Court invalidating State statutes under the due process clause. This Court said in *Davidson* v. *New Orleans,* 96 U. S. 97, 102:

> "When, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that 'no state shall deprive any person of life, liberty, or property without due process of law,' can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition of the States is of no avail, or has no application where the invasion of private rights is effected under the forms of State legislation."

The Court of Appeals intimated no disagreement with the views of the Appellate Division which have been referred to. The majority opinions (234 N. Y. 132, 136; Record, pp. 103, 114) were equally inconsistent with the principles laid down by this Court, passing the constitutional question with hardly more than a reference to *People* v. *Most,* 171 N. Y. 423.

The reference to the *Most* case is answered by a consideration of its facts. Most, an anarchist of

international notoriety, on the day of President McKinley's assassination, published an article urging his readers to "murder the murderers, save humanity, through blood and iron, poison and dynamite." If any man was ever convicted not for advocating a doctrine but for inciting to acts, it was Most. Indeed, the statute under which he was prosecuted and convicted did not relate to advocacy as such; it punished for "any act * * * which seriously disturbs or endangers the public peace" (*N. Y. Penal Law,* Sec. 43).

The distinction between the advocacy of doctrine and the incitement to assassination was noted by this Court in the Espionage decisions themselves and while the Court was developing the principles we have stated (*Frohwerk* v. *U. S.,* 249 U. S. 204, 206); and Mr. Freund, in the course of developing his argument against the constitutionality of the Criminal Anarchy Law of New York, concedes as obvious the right to punish for incitement to assassination (*Police Power,* Secs. 475, 478).

> "The difference lies in the fact that assassination may be accomplished in a moment, without warning, by a single person. * * * The state may suppress incitement to assassination because the danger can be coped with in no less drastic way."
>
> 36 *Harvard Law Review* 203, n. 25.

The *Most* case is an authority for the acknowledged right to punish criminal incitement, not for the asserted right to punish a repugnant political advocacy *per se,* irrespective of circumstances which might give it the character of incitement.

The decision in the instant case cannot be reconciled and was not sought to be reconciled by the Courts which rendered it with the principles of the precise subject as they have been developed in this Court. Because the decision below is inconsistent with the rulings here, that decision should be reversed. The importance and novelty of the subject justify, however, the demonstration which follows. That demonstration will be designed to show how completely the rulings of this Court express—and how definitely the rulings of the New York Courts violate—the principles of the right of political expression both as they have finally been developed in England at common law and as they were developed by the history of the American colonies and the American Revolution.

POINT III.

The New York statute rests upon principles of the old common law, which the modern law of England has repudiated in favor of principles in harmony with those of this Court.

In the eighteenth century (as we later show more fully) the crime of seditious libel in England had a strong affinity with the New York statutory crime of criminal anarchy. The object of prosecution was to prevent the circulation of sentiments of disaffection. Language was punished for its disloyal content, without inquiry whether it was uttered in circumstances in which it might have the quality of incitement. The process of correction or modification of evil counsels by time upon which

we now, under the conditions of free government, rely, was untried and unproved. Disaffection towards fundamental institutions was presumed, without proof of circumstances, to lead proximately to breach of the peace. The theory of punishment was derived from *Atwood's Case* (1605, 2 Rolle's Abridgement 78), where it was expressly held that the reason why disparagement of the Established Church was *per se* punishable was that it led to breach of the peace. The court might have said, as the New York courts said in this case, that though the defendant did not expressly urge unlawful acts or means for the accomplishment of his desire to change a fundamental institution, he was "chargeable with knowledge" that such an end could not be accomplished without violence (*People* v. *Gitlow,* 195 App. Div. 783, 795, Record, pp. 66, 84; cf. 234 N. Y. 149, Record, p. 120). The principle of the older common law of seditious libel is identical with that of the New York statute. Under both a danger of unlawful acts is deduced, not from circumstances or from language of direct incitement, but from the nature of the end sought. In purporting to test criminality by the unlawfulness of means advocated rather than by the nature of ends sought, the New York statute is only expressing what the older English common law implied.

The English courts, however, adapting the law of seditious libel to the modern facts of English constitutional freedom, have come to recognize an immunity of political advocacy *per se* like that implicit in the decisions of this Court.

The law of seditious libel as formulated in 1820 (Statute of 60 Geo. III and 1 Geo. IV, Chap. 8, Sec. 1) punishes as seditious any words tending

> "to bring into hatred or contempt the person of his Majesty * * * or the government or constitution of the United Kingdom as by law established, or either House of Parliament, or to excite his Majesty's subjects to attempt the alteration of any matter in Church or State as by law established, otherwise than by lawful means."

This statute declared only what had always been the theory of the law of seditious libel; it was not designed to temper or mitigate the existing law or practice. It was passed following the Manchester riots of 1819 (2 *May, Constitutional History of England,* Chap. X, pp. 191 *et seq.*). The earlier prosecutions under it proceeded exactly upon the principles of the older common law. The only issue of fact was that of publication. The intent and bad tendency of the libel were presumed upon no evidence outside of the libel itself (*Rex* v. *Burdett,* 1820, 4 B. & Ald. 95; *Reg* v. *Collins,* 1839, 9 C. & P. 456; *Reg* v. *Lovett, ib.* 462).

In later cases, however, the rule was extended to permit the jury to take into consideration all the surrounding circumstances—"the state of the country—the state of public opinion" (*Reg.* v. *Sullivan,* 1868, 11 Cox C. C. 44, at p. 59). And after nineteenth century parliamentary reforms had more fully established in England principles of political liberty similar to those established in America by the Revolution and confirmed by our constitutions, the bad tendency of libels became a matter of definite proof. Sir James Fitzjames Stephen says:

> "There may indeed be breaches of the peace which may destroy or endanger life, limb, or property, and there may be incitements to such offenses, but no imaginable censure of the government, short of a censure which has an immediate tendency to produce such a breach of the peace, ought to be regarded as criminal."
>
> 2 *Stephen, History of the Criminal Law,* 300.

And in 1909 Lord Coleridge charged the jury in *Rex* v. *Aldred** (74 J. P. 55; 22 Cox C. C. 1) in language whose accord with the principles applied by this Court in the Espionage Act cases is as striking as its contradistinction to the principles of the New York Criminal Anarchy Law. He said that the word "sedition" "implies violence or lawlessness in some form." He stated the test as the tendency towards incitement:

> "Whoever by language, either written or spoken, incites or encourages others to use physical force or violence in some public matter connected with the State, is guilty of publishing a seditious libel. The test is not either the truth of the language or the innocence of the motive with which he published it, but the test is this: Was the language used calculated to promote public disorder or physical force or violence in a matter of State?"

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*A case involving advocacy of political assassination in India. The defendant was convicted.

He made clear that this test involved consideration not alone of the content of the language but also of the circumstances of its use. He said:

> "The test * * * is for you, the jury, to decide, having heard all the circumstances connected with the case. In arriving at a decision of this test you are entitled to look at all the circumstances surrounding the publication with the view of seeing whether the language used is calculated to produce the results imputed: that is to say, you are entitled to look at the audience addressed, because language, which would be innocuous, practically speaking, if used to an assemblage of professors or divines, might produce a different result if used before an excited audience of young and uneducated men. You are entitled also to take into account the state of public feeling. Of course there are times when a spark will explode a powder magazine; the effect of language may be very different at one time from what it would be at another. You are entitled also to take into account the place and mode of publication."

He emphasized finally that no advocacy could be *per se* the subject of prosecution. He said that if a man

> "thinks that either a despotism, or an oligarchy, or a republic, or even no government at all, is the best way of conducting human affairs, he is at perfect liberty to say so. * * * He may seek to show that rebellions, insurrections, outrages, assassinations and suchlike, are the natural, the deplorable, the inevitable outcome of the policy which he is combating."

POINT IV.

The doctrines of the older English common law which the New York statute attempts to revive are doctrines which never maintained themselves in America. They are inconsistent with the theory of rights and liberties upon which American government rests, and to which the Fourteenth Amendment gave the protection of the Federal Constitution.

We have shown how this Court, under both the First and Fourteenth Amendments, limiting the punishment of advocacy to situations where circumstances give to advocacy the character of incitement, has recognized the constitutional immunity of advocacy *per se*. We have shown also how the law of England has deduced a similar immunity from the necessities of free government. It remains to point out how the conception of such an immunity developed in the American colonies and became imbedded in our institutions, and how decisively the view inconsistent with it has been repudiated.

The inconsistent view rests upon the assumption that freedom of speech and press in American constitutions means only what it meant at common law in England in the eighteenth century—a liberty to publish, subject to an unlimited right of the government to punish for what is published. We carried over, of course, only the parts of the common law consistent with American conditions. Common law doctrines deduced from and depend-

ent upon the very theory of the obligations of people to government from which we revolted were almost by definition inconsistent with American conditions, and were discarded.

The English eighteenth century law of seditious libel was such a doctrine. It is important as showing, not what American law is, but what it is not.

1. *The English common law of the eighteenth century, limiting freedom of the press to freedom from censorship, sanctioned the suppression of ideas of democracy and reform by prosecutions for seditious libel.*

A review of eighteenth century decisions will show that the English courts proceeded on principles like those of the New York Criminal Anarchy Law. Guilt depended solely upon the construction of the language used, irrespective of circumstances. Though punishment was theoretically based upon danger to the peace (*Atwood's Case,* 1605, 2 Rolle's Abridgment 78), the quality of disaffection in language used was sufficient in itself to support the ascription of seditious intent and dangerous tendency. The law in the eighteenth century ascribed substantially the same immutable sanctity to then existing institutions that Lord Jefferies at the trial of Algernon Sidney, shortly before the end of the seventeenth century (1683), had ascribed to monarchy by Divine Right, when he said:

> "Pray do not go away with that right of mankind, that it is lawful for me to write what I will in my own closet, unless I publish it; I have been told, Curse not thy king, not in thy thoughts, not in thy bed chamber, the birds of the air will carry it. I took

> it to be the duty of mankind, to observe that."
>
> 9 *Cobbett's State Trials,* 868.

In *Rex* v. *Tutchin* (1704), 5 St. Tr. 527, 14 Howell's St. Tr. 651, the defendant had attributed "the sad state of the country to the influence of French gold on those who have the conduct of affairs," and complained of "the mismanagement of the navy through the ignorance and incapacity of those who have the management of it." He had also commented upon the severe punishment of Daniel De Foe for his "Shortest Way with Dissenters" as inconsistent with the "ancient birthrights and immunities of Englishmen." Lord Holt charged the jury:

> **"If persons should not be called to account for possessing the people with an ill opinion of the Government, no Government can subsist: for it is very necessary for all Governments that the people should have a good opinion of it";**

finally leaving it to the jury to determine whether the words he had read to them

> "did not tend to beget an ill opinion of the administration of the government."

The *Tutchin* case is noteworthy, not for its harshness, but for its comparative liberality. The construction, intent and tendency of the libel were, according to most eighteenth century judges, matters of *law;* Lord Holt, however, left construction, intent and tendency to the jury. (See also his charge in *Fuller's Case,* 8 Cobbett's St. Tr. 78.)

In *Franklin's Case* (1731), 17 Howell's St. Tr. 1243, Lord Raymond established for most of the subsequent sedition cases of the eighteenth century that the jury had no function except to find whether the defendant published the matter as charged. Its construction, intent and tendency were for the Court as a matter of law, upon no evidence except the libel itself.

Truth was no defense—"the greater the truth, the greater the libel."

On these theories prosecutions for seditious libel flourished during the eighteenth century. The cases which are best known, and which enlisted American interest in the period between the Stamp Act and the Revolution, are those arising out of the writings of Wilkes and Junius in the period immediately preceding the American Revolution. Wilkes and Junius attacked a parliamentary system which they denounced as rotten with corruption; their attacks were the precursers of the nineteenth century parliamentary reforms. They bred in fact an ill opinion of government and a disposition to insist upon changes. They expressed the theory of the rights of the people as against government which had been formulated by Locke following the Revolution of 1688—the "inalienable rights" theory of the Declaration of Independence.

Wilkes' libel (No. 45 of the North Briton, published in 1763) was an attack on the ministry of Lord Bute. Wilkes wrote:

> "In vain will such a minister or the foul dregs of his power, the tools of corruption and despotism, preach up in the speech and spirit of concord. * * * A nation as sen-

> sible as the English will see that a spirit of concord, when they are oppressed, means a tame submission to injury and that a spirit of liberty ought then to arise * * * in proportion to the weight of the grievance they feel. Every legal attempt of a contrary tendency to the spirit of concord will be deemed a justifiable resistance."
>
> 19 *Howell, State Trials,* 1385-1386.

Wilkes was convicted during his absence from the country and outlawed. The Wilkes libel prosecution—an *ex parte* proceeding in view of Wilkes' absence in France—appears not to have been reported. Lord Mansfield is said to have charged as he did later in the cases arising from the publication of Junius' *Letter to the King* (2 *May, Const. Hist.,* Chap. IX). After Wilkes' outlawry was reversed, he was repeatedly excluded from Parliament, to which he was as often re-elected (19 *Howell, State Trials,* 981, *seq.,* 1075; 15 *Parliamentary History,* 1362).

As the identity of Junius was never learned, he was not prosecuted. The following are the reported prosecutions of printers of his *Letter to the King:*

> *Rex* v. *Almon* (1769), 20 Howell's State Trials 802, 821; Burr 2686.
> *Rex* v. *Woodfall* (1770), 20 *ibid.* 895.
> *Rex* v. *Miller* (1770), *ibid.* 870.

In all of these cases Lord Mansfield charged that the jury were to find only the fact of publication and the meaning of words (such as "k——g" and "c——n") obviously referring to the sovereign; that whether the language was true or false was immaterial; and that whether it was seditious was

an inference of law for the court. Should the jury render a verdict of guilty and the court find the language not libelous, judgment would be arrested. "The liberty of the press," he said, "is that a man may speak what he pleases without a licenser" (20 *Howell's State Trials,* 836, 893, 895, 896, 903).

Almon was convicted and punished. In the other cases, however, though the evidence of publication was clear, the juries declined to find the defendants guilty of seditious libel.

Junius' letter to the King contained passages which, *mutatis mutandis,* might support a conviction in New York for criminal anarchy. A large part of the letter relates to the case of Wilkes. It says (20 *Howell's State Trials,* 805-814) as to the situation created by Wilkes' expulsion from Parliament that

> "It is not in the nature of human society that any form of government in such circumstances can be long preserved."

Then follows a passage peculiarly interesting to Americans in the period between the Stamp Act and the Revolution:

> "If the English people should no longer confine their resentment to a submissive representation of their wrongs; if, following the glorious example of their ancestors, they should no longer appeal to the creature of the constitution, but to that high being who gave them the rights of humanity, whose gifts it were sacrilege to surrender, let me ask you, sir, upon what part of your subjects would you rely for your assistance? * * * The distance of the colonies would make it impossible for them to take an ac-

> tive concern in your affairs, if they were as well affected to your government as they once pretended to be to your person. * * * They know how to distinguish the s——n and venal p——t on one side, from the real sentiments of the English people on the other. * * * They left their native land in search of freedom, and found it in a desart. Divided as they are, into a thousand forms of policy and religion, there is one point in which they all agree: they detest the pageantry of a k——g."

Junius ironically suggested that a House of Commons, once started on the path of usurpation (by the expulsion of Wilkes), might follow the example of the Long Parliament:

> "The same pretended power which robs a subject of his birthright may rob an English k——g of his c——n."

The greater danger, however, is from the people:

> "When the complaints of a brave and powerful people are observed to increase in proportion to the wrongs they have suffered, when, instead of sinking into submission, they are roused to resistance, the time will soon arrive when every inferior consideration must yield to the security of the sovereign and the general safety of the state."

The failure, on the whole, of the Junius prosecutions was applauded in England by a powerful party. That party set on foot the movement which resulted, twenty years later, in Fox's Libel Act (32 Geo. III, Chap. 60, 1792)—an act which by empowering jurors (who would be peculiarly influenced by the average man's understanding and

feeling as to surrounding circumstances) to determine the seditious character of the writing, was an approach towards the principle that circumstances have a bearing upon criminality.* This party was, moreover, the party friendly to the grievances of the American colonists—the party which aided and encouraged American representatives, and presented their case in Parliament.

No less interesting to American colonials than these prosecutions for views with which they sympathized was a prosecution growing out of the events of the American Revolution itself. In *Rex* v. *Horne* (better known by his subsequent name of Horne Tooke), 20 Howell's St. Tr. 651, Cowp. 672 (1777), the alleged libel was "an announcement that a collection had been made for the relief of the widows, orphans, and aged parents of our beloved American fellow-subjects, who, faithful to the character of Englishmen, preferring death to slavery, were for that reason only inhumanly murdered by the King's troops at or near Lexington and Concord in the province of Massachusetts on the 19th of April last."

Lord Mansfield, departing from his former practice,† left the construction and intent of the libel to the jury, saying that, if it was a criminal arraignment of the king's troops, they would find their verdict one way; but that if they were of opinion that the contest was to reduce innocent subjects to

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* It was far, of course, from establishing a safe and definite principle of construction in the light of circumstances for the guidance of juries. In *Rex* v. *Cuthell*, 27 Howell's State Trials, 675, Lord Kenyon frankly stated the law to be that

> "a man may publish anything which twelve of his countrymen think is not blamable."

† As Hamilton and Chancellor Kent pointed out in the *Croswell case*, 3 Johns. Cases 421, p. 92, *infra*.

slavery, and that they were all murdered, then they might form a different conclusion with regard to the meaning and application of the paper. Horne was convicted.

So much for the English seditious libel prosecutions which Americans resented. Concurrently with them (1765-1769) appeared the first edition of Blackstone's *Commentaries.*

The "liberty of the press" which Blackstone formulated after the Wilkes case and while the Junius cases were pending was little more than a recognition that the censorship was definitely extinct and that no license to publish was required. Such recognition had not easily come about. In 1679, during a temporary lapse of the Licensing Act, the courts had held that an unlicensed publication of news was a crime at common law (*Carr's Case,* 7 St. Tr. 929); and after the Licensing Act had lapsed forever in 1695, the struggle to renew it continued through several sessions of Parliament (2 *May, Const. Hist.,* Chap. IX, 105-106). By Blackstone's time all thought of re-establishment of censorship had been abandoned. Recognizing this, and approving the Wilkes and Junius prosecutions, he argued that the liberty of the press, "properly understood," was not inconsistent with such prosecutions:

> "In this, and in other instances which we have lately considered, where blasphemous, immoral, treasonable, schismatical, seditious or scandalous libels are punished by the English law, some with greater, others with less degrees of severity, the liberty of the press, properly understood, is by no means infringed or violated.

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraint upon publication, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man and make him the arbitrary and infallible judge of all controverted points in learning, religion and government. But to punish, as the law does at present, any dangerous or offensive writings which, when published, shall on a fair and impartial trial, be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order of government and religion, the only solid foundations of civil liberty."
>
> *IV Bl. Com.* 151.

"Mr. Justice Blackstone, we all know, was an anti-republican lawyer," said Willes, J., in 1784 (in the *Dean of St. Asaph's Case,* 4 Douglas 73, 172, 3 T. R. 428). He earnestly supported the taxation of the American colonies without allowing them representation. He had progressed only so far in religious toleration as to believe that the officers of the Established Church should have power "to censure heretics, but not to exterminate or destroy them" (IV Bl. Com., 1st ed., Chap. IV, 49). He

did not question witchcraft, or the law as to that crime (*op. cit.*, p. 60).*

Distinguished as Sir William Blackstone and Lord Mansfield are in the ordinary fields of private law, and correct as they were in their statements of the contemporary meaning of "liberty of the press" under the law of England, their statements have not been taken as definitive of the liberty of the press established by the American Revolution.

2. ***American feeling for an absolute immunity of political doctrine per se was expressed in various colonial charters and statutes, in the refusal of colonial juries to indict or convict for seditious libel, and in the agitation which preceded the American Revolution; and an inalienable right to criticize government, however fundamentally, and advo-***

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* Blackstone's view of this subject evoked contemporary criticism even in England (*Furneaux, Letters to Blackstone*, 1770—republished in Philadelphia in 1773). It never obtained general acquiescence. It was indirectly through the libel cases (which included prosecutions for advocacy of universal suffrage—*Rex* v. *Palmer*, 32 Howell's St. Tr. 237, 391, 602; 2 *May, Const. Hist.*, Chaps. IX and X) a subject of controversy for over fifty years; and has finally been quietly superseded in England by the views quoted *supra* from Sir James Fitzjames Stephen and Lord Coleridge.

The artificial character of Blackstone's limitation of liberty of the press has been often pointed out (2 *Story on the Constitution*, Sec. 1886; *Cooley, Const. Lim.*, 6th Ed., 603-604; *Pound, Equitable Relief against Defamation*, 29 Harv. L. Rev. 651; *Schofield*, 9 Proceedings Am. Sociological Soc. 67). It was recognized by this Court in the Espionage Act cases (*Schenck* v. *U. S.*, 249 U. S. at p. 51). Many State decisions are inconsistent with it (see *Louthan* v. *Com.*, 79 Va. 196; *Ex parte Harrison*, 212 Mo. 88; *State ex rel. Metcalf* v. *District Court*, 52 Mont. 46). Blackstone's test is wholly inapplicable to modern conditions. It would exclude censorship of news in time of war or censorship of films (see *Mutual Film Corp.* v. *Ind. Com. of Ohio*, 236 U. S. 230, 241). It would apparently permit punishment for a true report of legislative proceedings, or criticism of a dominant political party.

cate changes, by any collective means, was asserted by the Declaration of Independence.

It was for two reasons natural for the American colonists to repudiate the conception of liberty of doctrine then prevailing in England. The common law rules were inappropriate to the conditions of colonists who had emigrated to find freedom. And Americans could see, as did Englishmen, that those rules were in a state of transition.

Men who left their homes in search of religious freedom brought with them an antipathy towards a law of seditious libel which protected the Established Church as a state institution. Advocacy of the religious doctrines which they came here to practice was itself seditious libel in England at the time of their migration (*Atwood's Case*, 2 Rolle's Abridgment 78; Croke's Reports, James I, p. 421; *Prynne's Cases*, 3 Howell's St. Tr. 563, 714). Later, their protests here against the conduct of officers of the Crown were often threatened, and sometimes visited, with prosecution. They resented the prosecution in England of advocates of their own thories of the rights of the people. The "beloved American fellow-subjects" of Horne Tooke would hardly accept a principle which made the avowal of sympathy for them a basis of prosecution. And, after founding a republic in which the government is the servant of the people, they would hardly take from an "anti-republican lawyer" a principle of freedom of expression limited in the interest of the theory that the people are the servants of the sovereign.

The colonists, again, knew the course of affairs in England. They had seen the prosecution of the *Seven Bishops* (12 Howell's State Trials, 183, 433)

for the seditious libel of impugning the "dispensing power" of King James II—the theory immediately thereafter repudiated by the Revolution of 1688. They had seen Locke publish with impunity in 1690 the democratic doctrines for which Algernon Sidney had been executed in 1683 (9 Cobbett's State Trials 817)—the doctrines which they restated in the Declaration of Independence.* They knew that the harsh law of England had passed through stages of greater severity, when it was a capital crime (constructive treason) to "compass or imagine" the *civil* death of the king—as by saying that his predecessor was still alive (*Constable's Case,* 2 and 3 Philip and Mary; see Sir Bartholomew Shower's defenses of the convictions of Algernon Sidney and Lord Russell, 9 Cobbett's State Trials, pp. 717 *et seq.*), and when it was a crime to publish anything without the *imprimatur* of the Licenser. If the colonists rejected the English law of disaffection as it stood at a particular moment, it would be no more than Englishmen had done and were doing.

It was not only natural, but inevitable, that American independence should establish a broad liberty of political doctrine.

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*"Locke, like his master" (Hobbes) "derived political authority from the consent of the governed, and adopted the common weal as its end. But in the theory of Locke the people remain passively in possession of the power which they have delegated to the prince, and have the right to withdraw it if it be used for purposes inconsistent with the end which society was formed to promote. To the origin of all power in the people, and the end of all power for the people's good—the two great doctrines of Hobbes—Locke added the right of resistance, the responsibility of princes to their subjects for a due execution of their trust, and the supremacy of legislative assemblies as the voice of the people itself."

Green, Short History of the English People, Ch. IX, Sec. 1.

(a) *Colonial charters and statutes as to freedom of religious doctrine.*

Before the middle of the seventeenth century, by the Toleration Act of 1649, the Catholic founders of Maryland had led the way in adopting the principle of toleration of antagonistic doctrines. Other colonies also made provisions for religious freedom.

Rhode Island Charter, 1663.

New York, Articles of Capitulation of the Dutch, Aug. 27, 1664, 2 Laws of N. Y., Revision of 1813, Appendix, p. I.

New York Charter of Liberties, 1683, 2 Laws of N. Y., Revision of 1813, Appendix, pp. V, VI.

New York Act of May 13, 1691, Acts of Assembly passed in the Province of New York (Ed. Bradford, 1726), p. 5.

Pennsylvania Charter, 1680.

Georgia Charter, 1732.

Some of the laws enacted a positive liberty whose exercise could be subject to punishment only when it broke out in actual breach of the peace. The Rhode Island Charter conditioned religious liberty as follows:

> "* * * they behaving themselves peaceblie and quietlie, and not useing this libertie to lycentiousnesse and profanenesse, nor to the civill injurye or outward disturbeance of others."

2 *Rhode Island Col. Records,* 3-21; *MacDonald, Documentary Source Book of American History,* 1606-1913, pp. 66-72.

The New York Charter of Liberties of 1683 provided that:

> "No person or persons which professe ffaith in God by Jesus Christ, shall at any time, be any ways molested, punished, disquieted, or called in question for any difference in opinion or matter of religious concernment, *who do not actually disturbe the civil peace* of the province, but that all and every such person or persons may, from time, and at all times, freely have, and fully enjoy, his or their judgments or consciences in matters of religion throughout all the province, they behaving themselves peaceably and quietly, and *not using the liberty to licenciousnesse nor to the civil injury or outward disturbance* of others."

To the same effect is the New York Act of May 13, 1691.

There was thus early in the history of the colonies a feeling for a positive immunity of doctrine up to the point where it actually disturbed the peace. Jefferson probably had in mind these early colonial charters and statutes when, in 1786, he drafted the Virginia Toleration Act—in which he said there was not a single new idea. This act (which, although not a colonial statute, may be cited here in view of its relationship) declared:

> "That to suffer the civil magistrate to intrude his power into the field of opinion, or to restrain the profession or propagation of principles, on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, because he, being, of course, judge of that tendency, will make his opinion the rule of judgment, and approve or condemn the sentiments of others

only as they shall square with or differ from his own. It is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order."

12 *Hening's Stat. of Virginia,* 84; cf. *Reynolds* v. *United States,* 98 U. S. 145, 163.

(b) *Seditious libel in the colonies.*

More directly in point than this record of legislation is the judicial history of the colonies upon the precise point of prosecution for seditious libel. At a time when such prosecutions flourished in England, they were rare in the colonies and opposition to them was determined. It appeared alike when prosecutions were instituted by officers of the Crown and when they were instituted by the colonists' own popularly elected legislatures. The difference in procedure in the colonies is signficant of a different attitude towards the offense. In England, prosecution for seditious libel was always by information (2 *May, Const. Hist.,* Chap. IX). In the colonies it was regularly (with occasional exceptions) by indictment.

In spite of the urgency of the Governor and Council, the Massachusetts House declined in 1721 to pass an "Act for Preventing of Libels and Scandalous Pamphlets, and for Punishing the Authors and Publishers thereof."

Duniway, Freedom of the Press in Massachusetts, 96.

In default of legislation, grand juries quite generally refused to find indictments for seditious libel, notwithstanding the importunities of legislatures or officers of the Crown.

James Franklin's Case, Mass., 1723, *Duniway, op. cit.* 101.

Fleet's Case, Mass., 1742, *Duniway, op. cit.* 114.

Fowle's Case, Mass., 1754, *Duniway, op. cit.* 115-119.

Zenger's Case, New York, 1734, *Livingston Rutherford, John Peter Zenger.*

When indictments were found, or when prosecution was by information, acquittals were usual.

William Bradford's Case, Pa., 1692; 2 *Thomas, History of Printing*, 10-24, *Duniway, op. cit.* 110 n.

Thomas Maule's Case, Salem, 1695, *Duniway, Freedom of the Press in Mass.*, 73.

The Case of John Peter Zenger, New York, 1734, *Livingston Rutherford, John Peter Zenger;* 17 *Howell's State Trials*, 675.

James Franklin's case, *supra*, was noteworthy. He was the older brother of Benjamin. He attacked, not the royal governor, but the legislature of Massachusetts—the popular representative body elected by the people. That body imprisoned him by legislative edict. Upon his release he published a doggerel satire on the proceedings with impunity.

The most famous prosecution was that of Zenger, the New York printer. His libel was an attack upon Governor's Cosby's administration. The Court (De Lancey, C. J.) charged the jury in the exact language of Lord Holt in *Tutchin's Case* (*supra*, p. 48). Though he urged the jury to leave to the Court the construction of the libel, they returned an unqualified verdict of not guilty. Mr. Rutherford (p. 249) lists fourteen editions of the report of this trial published during the eighteenth cen-

tury. Andrew Hamilton's defense of Zenger was a persuasive vindication of the right to breed an ill-opinion of government by criticism. "It is doubtful if any case in America had a more thoroughly interested and attentive audience. * * * This event has been called 'the Morning Star of that Liberty which subsequently revolutionized America'" (13 *Nat. Encyc. of Amer. Biog.*, 298-299).

(c) *The Pre-Revolutionary agitation and the Declaration of Independence.*

The agitation preceding the American Revolution was in its whole quality a denial of the law of seditious libel. American writers and speakers freely stated the principles (adapted from Locke, but still repugnant to English constitutional practice) that government exists for the good of the governed, and that governments subversive of this end should be opposed. The Massachusetts agitators included James Otis, Samuel and John Adams, John Hancock, Joseph Warren and Josiah Quincy. Town meetings instructed their delegates to the General Court to "take special care of the liberty of the press" (*Duniway, op. cit.* 123-124)—which, under the circumstances, was a liberty of disaffection.

American patriots used with impunity language almost identical with that for which the printers of Junius were prosecuted. Otis, in the controversies over the Writs of Assistance and the Stamp Act, in phrases that recall the equally famous sedition (as English lawyers would have branded it) of Patrick Henry, likened the royal abuses of power in America to those which had "cost one

king of England his head, another his throne." * He declared that Parliament could not legalize an invasion of "natural" rights—the rights now protected both by specific constitutional limitations and by the due process clause. He even implied that disobedience of laws invasive of natural rights would be justifiable. He said:

> "Parliament cannot make two and two five. * * * Parliaments are in all cases to declare what is for the good of the whole; but it is not the declaration of Parliamnet that makes it so. There must be in every instance a higher authority, God. Should an act of Parliament be against any of His natural laws, which are immutably true, their declaration would be contrary to eternal truth, equity, and justice, and consequently void."

He said that government is a trust for the good of mankind, each society being at liberty to establish such a form as it might deem best. "If a government is unfaithful to its trust, it should be opposed."

> *Otis, The Rights of the Colonies Asserted and Proved,* 1764,—reprinted in London in the same year by John Almon, the same who was convicted for publishing Junius' Letter to the King.
>
> *William Tudor, James Otis,* Boston, 1823, App. p. 500.

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* Otis was the Attorney General of Massachusetts. He resigned his office in order to assert in the courts the invalidity of the Writs of Assistance. His speech was reported by John Adams (*Works,* i., App. A, 523; cf. Vol. X, 183, 233, 244, 256), who said: "Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born" (quoted in *Boyd v. United States,* 116 U. S. at p. 625).

For such "seditious libels" Chief Justice Hutchinson of Massachusetts tried to get indictments on Blackstonian principles. In a charge to the grand jury in 1767 he said:

> "Pretty high Notions of the Liberty of the Press, I am sensible, have prevailed of late among us; but it is very dangerous to meddle with, and strike at this Court.
>
> The Liberty of the Press is doubtless a very great Blessing; but this Liberty means no more than a Freedom for every Thing to pass from the Press without a license. * * * To carry this absurd Notion of the Liberty of the Press to the Length some would have it—to print every Thing that is Libelous and Slanderous—is truly astonishing. * * *
>
> Formerly, no Man could print his Thoughts, ever so modestly and calmly, or with ever so much Candour and Ingenuousness, upon any Subject whatever, without a License. When this Restraint was taken off, then was the true Liberty of the Press" (*Duniway, op. cit.* 125, 128-129).

The freest government in Europe, he said, would not tolerate the freedom used in the Boston papers.

Officials of other colonies also complained of the prevalence of libelling. But all attempts to get indictments on Blackstonian principles failed. No indictments were returned, and the press responded with assertions of its freedom.*

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* *Duniway, op. cit.*, 123-128, citing as to New York and Pennsylvania, *New Jersey Archives*, XI, XII, XIV, *passim; Magazine of History*, July, 1905, p. 65. The material from Massachusetts is particularly significant, as that colony, as compared with some of the others, had been slow in sanctioning the liberty to differ. It is to be regretted that, in default of research such as President Duniway's in Massachusetts, the material in the other colonies is not readily accessible (*Duniway, op. cit.*, v.). The greater boldness of dissent in the southern colonies was noted by Burke at the time in his *Speech on Conciliation*.

The tendencies separately manifested by the colonies appeared in their collective action in the new struggle. One of the first acts of the Continental Congress in 1774 (*Journals*, Vol. I, p. 57) was a declaration of five "invaluable rights without which a people cannot be free and happy." One of these was the freedom of the press, whereby (contrary to the theory of the law of England that the danger of an ill-opinion of government outweighed the benefits of just criticism of officials),

> "oppressive officers are shamed into more honorable and just modes of conducting affairs."

Two years later came the Declaration of Independence. It is important for the phrases in which it asserted natural rights. It is important also as a supreme exercise and effectuation of the natural rights asserted:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are Life, Liberty, and the pursuit of Happiness,—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it."

Such was the conception of liberty of the American people when they achieved independence. It is unthinkable that men who not only asserted but acted upon such principles could carry over into a government based upon them a principle of Eng-

lish law under which mere advocacy of disaffection was a crime.*

(3) *The rights established by the Declaration of Independence were confirmed by the State Constitutions.*

The right under all ordinary circumstances to advocate anything whatsoever of a public nature was secured generally by the nature of our government and by the repetition in State Constitutions of the principles of the Declaration of Independence, and specifically by provisions for freedom of speech and press.

During the Revolution one state after another included in its constitution explicit reiterations of the principles of the Declaration of Independence as to the nature of government and the rights of the sovereign people (Virginia, 1776, *Poore, Charters and Constitutions,* 1908; Pennsylvania, 1776, *op cit.* 1540; Maryland, 1776, *op cit.* 817; New Jersey, 1776, *op. cit.* 1310; North Carolina, 1776, *op. cit.* 1409; New York, 1777, reciting the entire Declaration of Independence, *op. cit.* 1328-1332; Vermont, 1777, *op. cit.* 1860; Massachusetts, 1780, *op. cit.* 975). Most of the state constitutions also included free speech and press clauses (Virginia, 1776, *op. cit.* 1909; Pennsylvania, 1776, *op. cit.* 1542; Delaware, 1776, *op. cit.* 277; Maryland, 1776, *op. cit.* 820; New Hempshire, 1776, *op. cit.* 1282; North Carolina, 1776, *op. cit.* 1410; Vermont, 1777, *op. cit.* 1860; Georgia, 1777, *op. cit.* 383; South

* For the relation between the "inalienable rights" then declared and "liberty" in the Fourteenth Amendment, see the language of Bradley, J., in *Butchers Union Co.* v. *Crescent City Co.,* 111 U. S. 746, 762; see also *Allgeyer* v. *Louisiana,* 165 U. S. 578.

Carolina, 1778, *op. cit.* 1627; Massachusetts, 1780, *op. cit.* 959).*

It was obviously the very liberty of expression which had been used by American patriots in the pre-revolutionary agitation—an incident to the "inalienable rights" of liberty and the pursuit of happiness so integral that its separate declaration was a matter of superabundant caution rather than of necessity—that the state governments, both by their nature and by their constitutions, guaranteed to all citizens.

(4) *The rights established by the Declaration of Independence were exercised in the adoption of the Federal Constitution and confirmed as principles of federal constitutional law as against federal attack by the Bill of Rights.*

The establishment of the Federal Constitution, imperative as it was from the necessities of the time, was itself an exercise of the right asserted in the Declaration of Independence to alter or abolish a system of government. It was accomplished, over determined opposition, by an intelligent and effective agitation against the form of government existing under the Articles of Confeder-

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* Connecticut and Rhode Island remained under their colonial charters until long after the Revolution. As to the New York theory that the liberty of the press was secured by the nature of government by the people, without explicit declaration, see footnote, p. 13, *supra*.

The constitution first proposed for Massachusetts in 1778 failed of ratification because it contained no bill of rights; there is documentary evidence of objection by the towns on the precise ground that

> "by a Constitution the printing presses ought to be declared free for any Person who might undertake to examine the proceedings of the Legislature or any part of Government" (*Duniway, op. cit.*, 133).

ation—open disaffection towards it. Means which, though orderly, were unlawful in the sense that they disregarded the provisions of the Articles of Confederation for amendment, were advocated and employed.

The Articles of Confederation provided (Art. XIII) that

> "the articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, *and be afterwards confirmed by the Legislatures of every State.*"

The Constitution could hardly have been peacefully adopted and established had Hamilton and Madison not been free to breed disaffection towards the Confederation and advocate its alteration by unlawful means. The conditions which made their agitation a tremendous service are well known—insolvency of both government and citizens, unsound financial and commercial legislation by many states, Shays' Rebellion in Massachusetts and unrest elsewhere, interstate jealousy and friction, commercial stagnation, the incompetence and inadequacy of government under the Articles of Confederation.

These conditions explain why drastic action was necessary. They do not qualify the fact that the action was drastic.*

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* We believe that the best general accounts of the adoption of the Constitution and the contest for ratification are those in *Beveridge, Life of Marshall*, Vol. I, pp. 242-479; *Fiske, Critical Period*, 213-350; *Farrand, The Framing of the Constitution.*

The movement for the Constitution proceeded through a series of conferences between delegates from a few States—that of 1785 at Mount Vernon, relating primarily to the navigation of the Potomac; and that of 1786 at Annapolis, relating primarily to the Delaware-Chesapeake Canal and uniformity of customs duties. Following the Annapolis conference, Congress called a convention of all the States

> "to devise such further provisions as shall appear to them necessary to render the constitution of the federal government adequate to the exigencies of the Union, and to report to Congress such an act as, when agreed to by them, *and confirmed by the legislatures of every state,* would effectually provide for the same"

—in other words, to amend the Articles of Confederation by the procedure prescribed in Article XIII.

The Constitutional Convention of 1787 agreed, notwithstanding, that the Constitution should go into effect when ratified by *nine* States, instead of thirteen; and that ratification should not be by State legislatures as provided by the Articles of Confederation and by the resolution of Congress calling the Convention, but by State conventions. The Convention deemed it important that the Constitution should derive its sanction directly from the people in accordance with the principles of the Declaration of Independence (*Farrand, Records of the Constitutional Convention,* Vol. I, p. 126; Vol. II, pp. 88, 556; Vol. III, pp. 137, 159).

The revolutionary character of the proceeding was clearly perceived and vehemently denounced by the opponents of the Constitution, both in the press and in the State conventions. It was frankly de-

fended by the supporters of the Constitution as an exercise of the inalienable right to alter and abolish governments established by the Declaration of Independence. Thus Madison said that too insistent a regard for technicalities of procedure

> "would render nominal and nugatory the transcendant and precious right of the people 'to abolish or alter their governments as to them shall seem most likely to effect their safety and happiness.'"

He declared it to be

> "essential that such changes be instituted by some informal and unauthorized propositions made by some patriotic and respectable citizen or number of citizens."
>
> *Federalist*, No. 40.

The Constitution went into effect with the ratification, not of thirteen, but of only eleven States. Rhode Island and North Carolina had refused to ratify. The new government, violating the "inviolable" perpetual Confederation, simply proceeded without them. Of this Judge Cooley says:

> "The action of the eleven states in making radical revision of the Constitution and excluding their associates for refusal to assent, was really revolutionary in character, and only to be defended on the same ground of necessity on which all revolutionary action is justified, and which in this case was the absolute need, fully demonstrated by experience, of a more efficient general government."
>
> *Cooley, Constitutional Limitations*, 7th Ed., 9-10.

The precise process—"really revolutionary in character"—by which the Constitution was adopted is a process whose advocacy the Trial Court expressly held forbidden by the New York Criminal Anarchy Law. The reference to unlawful means in the act, he charged the jury, was not qualified by its association with force or violence. Advocacy of overthrow by any means other than constitutional amendment was prohibited (Record, p. 53; cf. Appellate Division opinion, Record, p. 208).

This case does not call for the contention that there is a right of revolution, much less for the contention that there is a legal right of revolution. We make no such contention and cite the history of the Revolution and of the adoption of the Constitution simply as showing in what sense the right to state and advocate doctrine must have been understood by the framers of the Declaration of Independence and of the state and federal Constitutions. Men who themselves advocated the overthrow first of British rule and then of the government created by the Articles of Confederation must have conceived that the right of free speech and free expression involved the right to advocate changes of government by unlawful means.

We have stated the argument that rests upon the circumstances in which the Constitution of the United States was drafted. We turn to a history of the contest over its ratification by the conventions of the states, which resulted in another clear confirmation of these principles as principles of the new government.

Seven states, none of them large, ratified readily. Pennsylvania ratified decisively, but over bitter opposition. In two States ratification failed.

The three remaining States, Massachusetts, New York and Virginia, with North Carolina and Rhode Island, represented about three-fifths, or a little less than two million, of the total population of a little over three million.

In Massachusetts, New York and Virginia the opponents of the Constitution had probably an initial majority. Their principal motive was the feeling that so powerful a mechanism of government would prove subversive of the principles of the Declaration of Independence.* In all three of these states ratification was finally procured, by narrow margins,† by a form of resolution (proposed in each case by the Federalists) stating that the Constitution was ratified upon the understanding that certain "explanations," specified in the resolution, were consistent with it. These "explanations" were statements in the nature of bills of rights, reserving the liberty established by the Declaration of Independence. All of them included declarations in favor of freedom of the press.

1 *Elliott's Debates,* Ed. 1881, pp. 322-323 (Mass.); *ibid,* p. 327 (New York and Virginia).

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* See particularly the speeches of Melancthon Smith, one of the most moderate and intelligent of the Anti-Federalists, whose final shift to the Federalists brought about ratification by New York, 1 *Elliott's Debates,* Ed. 1827, pp. 221-225, 228, 297; see also the speeches of Patrick Henry in the Virginia Convention, and a multitude of expressions by obscure delegates in the Massachusetts Convention, 1 *Elliott's Debates,* Ed. 1827, *passim.*

† The dates and votes were as follows:
Massachusetts, Feb. 6, 1788, 187 to 168.
Virginia, June 25, 1788, 89 to 79.
New York, July 26, 1788, 30 to 27.

The Virginia "explanation" as to construction recites the understanding

> "that the powers granted under the Constitution, being derived from the people of the United States, may be resumed by them, whenever the same shall be perverted to their injury or oppression; and that every power not granted thereby remains with them and at their will * * * and that, among other essential rights, the liberty of conscience, and of the press, cannot be cancelled, abridged, restrained, or modified, by any authority of the United States."
>
> 1 *Elliott's Debates,* Ed. 1881, p. 327.

The ratifications by North Carolina and Rhode Island, after the Constitution was in effect (November 21, 1789, and June 16, 1790, respectively), were upon similar interpretative explanations, covering liberty of the press (1 *Elliott's Debates,* Ed. 1881, 331-337).

Without these "explanations," confirming the principles of the Declaration of Independence, it is certain that neither Massachusetts, Virginia, nor New York would have ratified. In each of these States the loss on final ballot of from two to four per cent. of the delegates would have prevented ratification. Had any of these three States (New York being a geographical keystone, Massachusetts and Virginia the largest, but for Pennsylvania, in the Confederation) definitely refused to ratify, the Constitution would have been unlikely to go into effect without a civil war. The "explanations" were essential.

These explicit declarations of civil and political liberty were proposed and concurred in by the Federalist sponsors of the Constitution. The subsequent adoption in 1791 of the first ten

amendments, including recognition not only of freedom of speech and press, but of the reserved powers of the people, guaranteed their good faith. It amounted to a ratification of the principles of inalienable political liberty upon which the revolution was based, as those principles were popularly understood, free of "speculative and refined" constructions. Freedom of expression had the same association with the principles of the Declaration of Independence that it had in the state constitutions. Its meaning is determined by reference to its historical origin in American constitutional law, in the light of "the necessities which gave birth to the constitution, the controversies which preceded its formation, and the conflicts of opinion which were settled by its adoption" (*Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 428, 558; *Missouri* v. *Illinois*, 180 U. S. 208, 219; *Knowlton* v. *Moore*, 178 U. S. 41, 95). In this light it is clear that freedom of expression extends to drastic advocacies with relation to government.

It was free speech in the light of the Declaration of Independence—freedom to advocate drastic change by means which the New York courts would to-day hold unlawful—that was used in procuring the ratification of the Constitution. This freedom was already established in the states both by express constitutional provisions and by the nature and origin of the state governments. It is an attribute of free government as fundamental and as immune from arbitrary interference in the absence of circumstances of necessity or danger as the right of private property. It was used, as of right and of course, by citizens of all the states in 1788. No state (though in several of them the influence of the Anti-Federalists was preponderant prior to the

ratifying conventions) even considered restraining its use by prosecutions in the nature of seditious libel.

The Bill of Rights amendments recognized the existence of this liberty in the states, and guaranteed it against federal encroachment. The Fourteenth Amendment "furnishes an additional guarantee against any encroachment by the states" (*Cruikshank* v. *United States, Butchers Union Co.* v. *Crescent City Co., Allgeyer* v. *Louisiana, supra*, Point I).

The adoption of the Constitution proved that such a liberty is both safe and beneficial. Deeply as the people had been imbued with economic fallacies, the vision and intelligence of the community (always initially a minority), appealing to the good sense of the community, had succeeded in a single campaign in swinging a majority to sound principles and in convincing them of the necessity of enforcing those principles even in disregard of the then organic law of the Confederation. They could not so quickly have succeeded had not advocacy of unsound principles and courses been allowed an equal latitude. The extremes of economic fallacy which had culminated in Shays' Rebellion in Massachusetts* and the commercial paralysis of Rhode Island through a fiat money forcing act had furnished object lessons for the need of sound government more persuasive than the logic of the Federalist. Our subsequent history has shown† that un-

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* A movement for repudiation of debts.

† See, for example, the successive collapses of Know-Nothingism, Greenbackism, and Populism.

der constitutional checks the good sense of the whole people will reject subversive movements before they have gone so dangerously far towards effecting themselves as those of 1786. The fallacies of 1786 had sprung from real distresses calling for remedy. The distress of the uninformed can often find little expression except through quacks and demagogues. Had not the bad sense of the community been free to urge its dangerous remedies, good sense would not so readily have been stimulated to adopt the sound remedy of strong government and prosperity, and to confirm the right to advocate even dangerous doctrines as its best ultimate security.

POINT V.

The New York statute rests upon the same principle as the Federal Sedition Law of 1798—a principle which this Court and every department of the government subsequently condemned upon constitutional grounds.

We have discussed the legal principles and in broad outline the relevant constitutional history of the right of free expression. It remains to note the only departure, prior to the New York statute, from the constitutional policy that political expression may not, *per se*, be a subject of prosecution, and how definitely that departure was repudiated as constitutionally unsound by every department of American government—specifically by the people, the Executive, and Congress, and in principle by jurists of high authority and finally by this Court.

(a) *The Sedition Law of 1798.*

The Sedition Law of 1798 provided:

"Sec. 2. And be it further enacted, That if any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either of them, the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of any such law, or of the powers in him vested by the constitution of the United States, or to resist, oppose, or defeat any such law or act, or to aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government, then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars and by imprisonment not exceeding two years.

Sec. 3. And be it further enacted and declared, That if any person shall be prosecuted under this act, for the writing or publishing any libel aforesaid, it shall be lawful for the defendant, upon the trial of the cause

to give in evidence in his defence, the truth of the matter contained in the publication charged as a libel. And the jury who shall try the cause, shall have a right to determine the law and the fact, under the direction of the court, as in other cases.

Sec. 4. And be it further enacted, That this act shall continue and be in force until * * * (March 3, 1801) * * * and no longer: Provided, that the expiration of the act shall not prevent or defeat a prosecution and punishment of any offence against the law, during the time it shall be in force."

Act of July 14, 1798, 1 Stats. at Large 596.

The Sedition Law was passed as part of the preparation for the war with France—a revolutionary power whose "Jacobinical" ideas as advocated by the Jeffersonian Republicans were believed by the Federalists to threaten our institutions. Politics were heated. Democracy was characterized by leading Federalists as a "disease." The preservation of the nation was identified with the continuance of Federalist political predominance.

The feelings of the time were reflected even by judges upon the bench. The Chief Justice of Massachusetts, charging a grand jury, denounced

> "the French system-mongers, from the Quintumvirate of Paris to the Vice President" (Jefferson) "and minority of Congress, as apostles of atheism and anarchy, bloodshed and plunder."

Francis Wharton, State Trials, Int., p. 47.

Justice Iredell concluded a charge to the grand jury at Philadelphia in 1798 with a panegyric upon the Federalist administration, described as "our government," to which

> "the only crime which is fairly imputable is, that the minority have not been suffered to govern the majority, to which they had as little pretension upon the ground of superiority of talents, patriotism, or general probity, as upon the principles of republicanism, the perpetual theme of their declamation. If you suffer this government to be destroyed, what chance have you for any other? A scene of the most dreadful confusion must ensue. Anarchy will ride triumphant, and all lovers of order, decency, truth and justice be trampled under foot. May that God, whose peculiar providence seems often to be interposed to save these United States from destruction, preserve us from this worst of all evils. And may the inhabitants of this happy country deserve his care and protection by a conduct best calculated to obtain them!"
>
> *Wharton, State Trials,* 481.

Judicial feeling on political questions ran so high that judicial expressions were often printed and circulated as campaign documents. See

> *Wharton, State Trials, Introduction,* p. 47.
>
> 3 *Beveridge's Marshall,* pp. 29 *et seq.*

There were only about twenty-five arrests under the Sedition Law and ten trials, all resulting in convictions. The most severe sentence was of eighteen months in prison and $400 fine. Only four of the trials were fully reported.

U. S. v. *Matthew Lyon*, Oct., 1798, Wharton, State Trials, 333.
U. S. v. *Anthony Haswell*, 1800, *ibid.* 684.
U. S. v. *Thomas Cooper*, 1800, *ibid.* 654.
U. S. v. *James Thompson Callender*, 1800, *ibid.* 688.

Such information as is accessible as to the other cases is contained in

Anderson, Enforcement of the Alien and Sedition Laws, Annual Report of the American Historical Association, 1912, pp. 115 *et seq.*
3 *Beveridge, Life of Marshall*, pp. 41 *et seq.*
Allan McLane Hamilton, Life of Alexander Hamilton, pp. 444 *et seq.* (indictment of Duane).

The constitutionality of the Sedition Law was never tested by an appeal. Indeed there is little constitutional discussion in the reported trials. No act of Congress had ever, at that time, been held unconstitutional; the case of *Marbury* v. *Madison* (1 Cranch 137) did not arise until 1803. Constitutional construction was in general a subject of political controversy. The only forum in which the constitutional questions involved in the Sedition Law could be fought out was the forum of politics. They were fought out in the legislatures, in Congress, and in the election of 1800.

At bottom, the issue was whether freedom of speech and press was to be construed in the light of Blackstone and the common law, or in that of the Declaration of Independence.

The Federalists argued that freedom of speech and press in our system meant exactly what it had meant at eighteenth century common law as stated by Blackstone (see p. 54, supra)—freedom from censorship, but with a right of the government to punish after publication whatever it might brand as of ill tendency. They asserted the theory that there was a federal common law of crimes in the United States, including the common law crime of seditious libel. *A fortiori,* therefore, it was within the implied powers of Congress to temper the harshness of the common law of seditious libel by the Sedition Law.

The justices of the Supreme Court had severally gone on record for the proposition that acts injurious to the government were punishable in the courts of the United States at common law:

Chief Justice Jay's charge to the grand jury at Richmond, May 22, 1793, *Wharton State Trials,* 38; 3 *Johnston, Corr. etc. of Jay,* 478-485.

U. S. v. *Henfield,* Wharton St. Tr., 83-89.

U. S. v. *Warall, ibid.* 189, 197; 2 Dallas 384 (1798).

U. S. v. *Williams,* Wharton St. Tr., 652.

Justice Wilson's charge at Philadelphia, July, 1793, 3 *Works of James Wilson,* 384; *Wharton, State Trials,* 60.

U. S. v. *Ravara,* 2 Dallas, 297-299; Wharton State Trials, 90.

On the theory that seditious libel was, on common law principles, a crime of federal cognizance without an express statute, the Federalists extolled the Sedition Law for its "lenity" in tempering the

common law by limiting the punishment to be imposed, by permitting evidence of truth, and by referring to the jury both the "law" (*i. e.*, the intent and construction) and the fact. It was on this theory of the "lenity" of the Sedition Act that Chief Justice Ellsworth ironically suggested that in case the repealing resolution of 1800 should pass, its preamble should read:

> "Whereas the increasing danger and depravity of the present time require that the law against seditious practices *should be restored to its full rigor,* therefore," etc.
>
> 2 *Beveridge, Marshall,* 451-452.

See, also:

> *Justice Iredell's Charge to the Grand Jury at Philadelphia,* April 11, 1799, Wharton, State Trials, 477.

Justice Iredell's charge to the grand jury at Philadelphia (the conclusion of which was quoted at p. 80, *supra*) was the leading argument in favor of constitutionality. Justice Iredell held, as did all the Federalist supporters of the act, that "freedom of the press" meant in American constitutions exactly what it meant in Blackstone (see p. 54, *supra*)—freedom from previous restraints upon publication, subject to punishment for dangerous or offensive writings when published. He, too, commended the "lenity" of the Sedition Act in tempering the common law. He thought that the danger of oppressive prosecution was met by the admission of evidence of truth. As to the argument based on the nature of our government, he said:

> "It is said, libels may rightly be punishable in monarchies, but there is not the same necessity in a republic. The necessity in the latter case I can conceive greater, because in a republic more is dependent on the good opinion of the people for its support."
>
> *Wharton, State Trials,* 477.

The Sedition Law was the subject of vast public comment and the state legislatures issued addresses attacking and defending it. The famous resolutions of the Virginia and Kentucky legislatures in 1798 and 1799 (drafted respectively by Madison and Jefferson) warmly denounced the statute as unconstitutional.

4 *Elliott's Debates,* Ed. 1881, 528, 540.

The Federalist legislatures of other states answered the Virginia and Kentucky Resolutions (*op. cit.* 532-538).

Madison's reply on behalf of the Virginia legislature (1800) is important not only as a cogent and temperate demonstration of the unconstitutionality of the Sedition Law, but also as a statement of the theory on which the people in the election of 1800 repudiated it. His main point is that American constitutional freedom of the press is to be construed in the light of the nature and history of our own government—the principles of the Declaration of Independence—not in that of Blackstone and the common law. He disposed incidentally of the argument that the privilege of giving evidence of truth, which even the Sedition Law extended and the common law withheld, substantially diminished the danger of oppressive prosecution. The administration of the statute had made it ob-

vious that upon such questions as actually arose—whether the character of President Adams was arbitrary; whether Gideon Henfield, a seaman impressed into the British navy who had escaped and whom President Adams had "advised" the District Judge at Charleston to turn over to the English authorities, was or was not an American citizen—a jury of Federalists would find one way, a jury of Jeffersonian Republicans another.

On the main point—the inconsistency of the crime of seditious libel with the nature of American government—Madison said, after stating the Blackstonian definition of freedom of the press:

> "It appears to the committee that this idea of the freedom of the press can never be admitted to be the American idea of it; since a law inflicting penalties on printed publications would have a similar effect with a law authorizing a previous restraint on them. It would seem a mockery to say that no laws should be passed preventing publications from being made, but that laws might be passed for punishing them in case they should be made.
>
> The essential difference between the British government and the American constitutions will place this subject in the clearest light.
>
> In the British government, the danger of encroachments on the rights of the people is understood to be confined to the executive magistrate * * * it is a principle, that the Parliament is unlimited in its power. * * * Hence, too, all the ramparts for protecting the rights of the people—such as their Magna Charta, their bill of rights, etc.—are not reared against their Parliament, but against the royal prerogative. * * *

> In the United States, the case is altogether different. The people, not the government, possess the absolute sovereignty. The legislature, no less than the executive, is under limitations of power. * * * The great and essential rights of the people are secured against legislative as well as executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt, not only from previous restraint of the executive, as in Great Britain, but from legislative restraint also; and this exception, to be effectual, must be an exemption, not only from the previous inspection of licensers, but from the subsequent penalty of the laws. * * *
>
> The nature of governments elective, limited, and responsible, in all their branches, may well be supposed to require a greater freedom of animadversion, than may be tolerated by the genius of such a government as that of Great Britain. * * * Is it not natural and necessary, under such different circumstances, that a different degree of freedom in the use of the press should be contemplated? * * * It has accordingly been decided, by the practice of the states, that it is better to leave a few of its obnoxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits."

His reference to the then recent history of the adoption of the Constitution sustains the argument advanced herein. He said:

> "And can the wisdom of this policy be doubted by any one who reflects that to the press alone, checkered as it is with abuses,

> the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflects that to the same beneficent source the United States owe much of the lights which conducted them to the rank of a free and independent nation and which have improved their political system into a shape so auspicious to their happiness? Had Sedition Acts, forbidding every publication that might bring the constitutional agents into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press, might not the United States have been languishing, at this day, under the infirmities of a sickly Confederation? Might they not, possibly, be miserable colonies, groaning under a foreign yoke? * * * The freedom of conscience, and of religion, is found in the same instrument which asserts the freedom of the press. It will never be admitted that the meaning of the former, in the common law of England, is to limit their meaning in the United States."

To withhold power over the press was one expression of the "anxious circumspection" with which powers were granted and balanced—there is no other check than the press on abuse of some of them.

> "And, in the opinion of the committee, well may it be said, as the resolution concludes with saying, that the unconstitutional power exercised over the press by the Sedition Act ought, 'more than any other, to produce universal alarm; because it is levelled against the right of freely examining public characters and measures, and of free com-

> munication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.'"
>
> 4 *Elliott's Debates,* Ed. 1881, 570-580.

Marshall, as Federalist leader in the Virginia legislature, defended the constitutionality of the Sedition Law on Blackstonian principles in opposition to Madison. But when the question of its repeal came up in 1800 during his term in Congress, he was the only Federalist who voted for the repeal; the resolution for repeal (which failed in the Senate) carried the House of Representatives 50 to 48.

> "Had he voted with his party, the Republican attack would have failed. * * * He had been and still was the only Federalist to disapprove, openly, the Alien and Sedition Laws."
>
> 2 *Beveridge, Marshall,* 451.

The Sedition Law marked the beginning of the political landslide which in 1800 swept the Federalist party out of power, and ultimately out of existence.

The Sedition Law was as definitely repudiated by the President and Congress as it had been by the people. Jefferson at once pardoned all those still serving sentences under it. In answer to a complaint from Mrs. Adams, Jefferson wrote in 1804:

> "I discharged every person under punishment or prosecution under the Sedition Law, because I considered, and now consider, that law to be a nullity as absolute and as palpa-

ble as if Congress had ordered us to fall down and worship a golden image."

4 *Jeff. Corr.* 23; Wharton, State Trials, 719.

The expiration of the law by its own limitation in 1801 left no occasion for immediate action by Congress. But all fines imposed were remitted with interest in 1840.

26th Congress, 1st Session, House Doc. No. 86.

The principles of the Sedition Law, as we shall show, were repudiated by the courts as well. In one hundred years of history, during more than half of which discussion of secession was in one quarter or another almost constantly in the air, no attempt was made to revive its principles.

(b) *The disappearance of the common law theory of seditious libel—People* v. *Croswell,* 3 Johns. Cas. 421, and *United States* v. *Hudson,* 7 Cranch 32.

So much for the history of legislation. It remains to note the disappearance of the common law theory of seditious libel in the state courts and in this Court.

A few prosecutions in state courts for seditious libel went on the principles urged in support of the Sedition Act.

Abijah Adams was convicted in Massachusetts for common law seditious libel, for a laudatory newspaper report of a speech in the State Senate, in opposition to the proposed Massachusetts answer to the Virginia and Kentucky Resolutions. The

Court in pronouncing sentence, attacked the Virginia and Kentucky Resolutions and the principles of free press as "dangerous to public tranquillity."

> *Records of Supreme Jud. Ct. of Mass.*, 1798-1799, 183-186; 3 *Beveridge's Marshall*, 44-45; *Duniway, Freedom of the Press in Mass.*, 144-145.

It is believed that the last state prosecution for seditious libel in the United States was the case of

> *Respublica* v. *Dennie*, 4 Yeates 267 (Pa., 1805).

Dennie had written in a newspaper:

> "A democracy is scarcely tolerable at any period of national history. * * * It has been tried in France, and terminated in *despotism*. It was tried in England, and rejected with the utmost *loathing and abhorrence. It is on its trial here, and its issue will be civil war, desolation and anarchy.* No wise man but discerns its *imperfections*, no good man but shudders at its *miseries*, no honest man but proclaims its *fraud*, and no brave man but *draws his sword against its force.* * * *" (Italics Dennie's.)

The Court (Yeates, J.) charged on familiar Blackstonian lines, but left it open for the jury to acquit if they found that Dennie "honestly meant to inform the public mind, and warn them of supposed dangers in society, though the subject may have been treated erroneously." He said also:

> "The enlightened advocates of representative republican government pride themselves in the reflection, that the more deeply their

> system is examined, the more fully will the judgments of honest men be satisfied, that it is the most conducive to the safety and happiness of a free people."

Dennie was acquitted.

In the New York case of

> *People* v. *Croswell,* 3 Johns. Cases 421 (1804),

the principle of prosecution for political language *per se* was definitely repudiated. A great Federalist lawyer, Hamilton, and a great Federalist judge, Kent, recognized that American history and theories of government required an ample liberty of the press. They limited it, as this Court has done, only where its exercise is under such circumstances as to lead proximately to substantial danger.

The prosecution was for a personal rather than for a seditious libel, though the subject of the libel and the recent experience under the Sedition Act led to its being treated as for sedition by both Court and counsel. The libel charged was a Federalist newspaper publication to the effect that Jefferson paid Callender (whose trial in Virginia was the most conspicuous case under the Sedition Act) for calling Washington a traitor, robber and perjurer, for calling John Adams a hoary-headed incendiary, and for most grossly slandering the private characters of men whom Jefferson well knew to be virtuous.

On motion for a new trial in the Supreme Court, the Court was equally divided. Lewis, C. J. and Livingston, J. sustained the trial rulings. Kent

and Thompson, JJ. were for a new trial. Alexander Hamilton argued for the defendant in support of the motion. The legislature immediately enacted into law the principles asserted by Hamilton and Justice Kent by Laws of 1805, Chapter 90 (which served as the basis of the constitutional provision adopted in 1821), and judgment was never entered.

Hamilton undertook to work out a defense on common law principles and precedents—arriving at substantially the same position which, as we have shown, the English courts have taken in recent years. It was necessary to repudiate most of the English cases in the eighteenth century and Hamilton frankly did so. He said (p. 465):

> "Lord Mansfield showed by his inconsistencies and embarrassment on this subject, that he was supporting a violent paradox. But he did not speak of the errors of that great man, but with the highest veneration for his memory. He would tread lightly over his ashes, and drop a tear of reverence as he passed by."

Justice Kent adopted Hamilton's contention that the eighteenth century decisions were unsound. He held (1) that whether a writing is seditious libel depends upon whether the writer's *intention* was malicious and seditious *and upon the tendency of the publication to disturb the peace, admitting extrinsic circumstances as bearing upon tendency;* (2) that truth is evidence, not necessarily conclusive, of good intent; (3) that intent and tendency are for the jury. The fact that all three of these propositions represent a departure from Black-

stonian principles by a great and conservative American jurist is noteworthy; of direct bearing upon the present appeal is the discussion by Hamilton and Justice Kent of the first of these principles.

Hamilton said in his argument on the first proposition (pp. 354-355):

> "Texts taken from the holy scriptures and scattered among the people, may, in certain times, and under certain circumstances, become libellous, nay, treasonable. These texts are, then, innocent, libellous, or treasonable, according to the time and intent; and surely the time, manner, and intent are matters of fact for a jury.
>
> *The law cannot adjudge a paper to be a libel, until a jury have found the circumstances connected with the publication.*"

Justice Kent said (p. 364):

> "*The simple act of publication, which was all that was left to the jury, in the present case, was not, in itself, criminal.* It is the applications to times, persons and circumstances; it is the particular intent and tendency that constitutes the libel. Opinions and acts may be innocent under one set of circumstances, and criminal under another. This application to circumstances, and this particular intent, are as much matters of fact, as the printing and publishing."

This is exactly the principle for which we contend and which we believe this Court has adopted.

Justice Kent concluded his opinion (390-394) with argument substantially in line with Mad-

ison's, for the construction of liberty of the press in the light of the nature and origin of our government. He said:

> "In England they have never taken notice of the press in any parliamentary recognition of the principles of the government, or of the rights of the subject, whereas the people of this country have always classed the freedom of the press among their fundamental rights. This I can easily illustrate by a few examples.
>
> The first American congress, in 1774, in one of their public addresses (*Journals*, vol. 1, p. 57), enumerated five invaluable rights, without which a people cannot be free and happy. * * * One of these rights was the *freedom of the press*, and the importance of this right consisted, as they observed, 'besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honorable and just modes of conducting affairs.' The next high authority I shall mention, is the Convention of the people of this state, which met in 1788. They declared unanimously (*Journals*, pp. 45, 51, 52, 73, 74), that the freedom of the press was a right which could not be abridged or violated. The same opinion is contained in the amendment to the constitution of the United States, and to which this state was a party. * * *
>
> These multiplied acts and declarations are the highest, the most solemn, and commanding authorities, that the state or the nation can produce. They are generally the acts of

> the people themselves, when they came forward in their original character, to change the constitution of the country, and to assert their indubitable rights. And it seems impossible that they could have spoken with so much explicitness and energy, if they had intended nothing more than that restricted and slavish press, which may not publish anything, true or false, that reflects on the character and administration of public men. * * * *And if the theory of the prevailing doctrine in England (for even there it is now scarcely anything more than theory), had been strictly put in practice with us, where would have been all those enlightened and manly discussions which prepared and matured the great events of our revolution, or which, in a more recent period, pointed out the weakness and folly of the confederation, and roused the nation to throw it aside, and to erect a better government upon its ruins? They were, no doubt, libels upon the existing establishments, because they tended to defame them, and to expose them to the contempt and hatred of the people.* They were, however, libels founded in truth, and dictated by worthy motives."* (Italics ours.)

Madison and Hamilton, the principal authors of the Federalist and one of them the "Father of the Constitution," and Kent, the foremost jurist of the state courts in his time, thus laid down principles more than a century ago in accord with those ap-

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* The *Croswell* case was one of the last prosecutions in the nature of seditious libel in any American court. The case has become best known for the proposition that evidence of truth is admissible in cases of ordinary criminal libel—which has been incorporated in the constitutions of more than twenty states. Because of Chancellor Kent's belief in the efficacy of truth as a defense in all libel cases, he conceived that the Sedition Law of 1798 was constitutional.

plied by this Court in the Espionage Act cases. We shall see that the Blackstonian theory of seditious libel which the Federalists enacted in 1798 and which the New York Criminal Anarchy Law seeks to revive, were long ago repudiated by this Court, and repudiated at a time when Chief Justice Marshall presided over its deliberations.

In 1812, the doctrine on which the Federalists had based their argument in support of the Sedition Law of 1798—the doctrine that the crime of seditious libel was cognizable in the courts of the United States without express statute—was wiped out by this Court in the case of:

United States v. *Hudson,* 7 Cranch 32.

That was a case certified by the Circuit Court for the District of Connecticut, which was divided in opinion on a demurrer to an indictment for libel on the President and Congress. The alleged libel was an article in the Connecticut Courant charging that the President and Congress had secretly voted $2,000,000 as a present to Bonaparte for leave to make a treaty with Spain. The Court disposed of the case on the broad ground that the United States courts can exercise no criminal jurisdiction except under an express statute, saying:

> "Although this question is brought up now for the first time to be decided by this court, we consider it as having been long since settled in public opinion. In no other case for many years has this jurisdiction been asserted; and the general acquiescence of legal men shows the prevalence of opinion in favor of the negative of the proposition."

In so holding, this Court repudiated the theory of a federal common law of crimes which had been the premise of the argument in favor of the constitutional power of Congress to pass the Sedition Law of 1798. On the broader question whether there could be such a jurisdiction as for seditious libel, Mr. Justice Johnson said:

> "The only ground on which it has ever been contended that this jurisdiction could be maintained is, that, upon the formation of any political body, an implied power to preserve its own existence and promote the end and object of its creation necessarily results to it."

He expressly stated the doubt which the foregoing extract implies as to

> "how far this consideration is applicable to the peculiar character of our constitution."

The decisions of this Court under the First and Fourteenth Amendments, we submit, answer in principle the question which Mr. Justice Johnson raised. The character of our government is such that language or advocacy with relation to it can be punished, not for its content, but only in circumstances where it has causal connection with a substantive evil, consummated, attempted or likely.

POINT VI.

The New York statute is invalid under general principles of the law of due process.

This case presents a situation where the right of the state to protect its existence and good order is confronted with a right equally fundamental—the right of free expression with relation to government. Where two rights meet, their harmony requires a balancing of considerations.

The power which the State of New York invoked when it passed the Criminal Anarchy Law is, we suppose, the police power. That legislation accomplishes some relatively small abridgment of rights protected by the Constitution is not conclusive against it if it directly serves a public need and infringes private rights only so far as necessary. "An ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use" (*Noble State Bank* v. *Haskell,* 219 U. S. 104, 110). But the fact that a claim of public benefit can be made in favor of a statute will not save it if it goes further in restricting constitutional rights than the public need requires. Thus, in sustaining the drastic act of Congress regulating tenancies and rents in the District of Columbia upon the ground of emergent public necessity, this Court gave warning that such regulations, "pressed to a certain height, might amount to a taking without due process of law" (*Bloch* v. *Hirsh,* 256 U. S. 135, 156). And in *Pennsylvania Coal Co.* v. *Mahon* (Advance Opin-

ions, Dec. 11, 1922) the indubitable public interest in preventing subsidence of dwellings from coal-mining under them was held, where the safety of the occupants could be provided for by notice, not "sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights" as the statute contemplated. Similarly, in *Adams* v. *Tanner* (244 U. S. 590, 594), the prevalence of abuses was held sufficient to justify the minor interference with private right involved in regulating, but not the serious interference involved in prohibiting, private employment agencies.

A statute which, like the New York Criminal Anarchy Law, forbids certain advocacies with relation to government irrespective of circumstances is on its face a "palpable invasion of rights secured by the fundamental law"; the data upon which to judge its substantiality of relation to a proper object of the police power are wanting. It presents a case like those in which this Court, undertaking to apply the principle of balance and to weigh the public purpose which the statute is designed to serve against the invasion of constitutional rights which it involves, has condemned the statute as a naked restriction—one whose effect is the mere denial of a right which the Constitution gives:

> *Coppage* v. *Kansas*, 236 U. S. 1,
> *Buchanan* v. *Warley*, 245 U. S. 60.

In *Coppage* v. *Kansas* the Court passed upon a statute making it an offense for an employer to attach to employment the condition that the employee should not be a member of a labor union. The statute was held unconstitutional. Mr. Justice Pitney, writing for the Court, concluded that the

statute was related to the public health, safety, morals or welfare only insofar as it tended to level inequalities of fortune between employer and employee by depriving the employer of his liberty and financial independence. He expressed the basis of the decision as follows (pp. 18-19):

> "In short, an interference with the normal exercise of personal liberty and property rights is the primary object of the statute, and not an incident to the advancement of the general welfare. *But, in our opinion, the Fourteenth Amendment debars the States from striking down personal liberty or property rights, or materially restricting their normal exercise, excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare. The mere restriction of liberty or of property rights cannot of itself be denominated 'public welfare,' and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the Amendment.*" (Italics ours.)

In *Buchanan* v. *Warley, supra,* a Louisville ordinance segregating the white and colored races was before the Court. The ordinance forbade a colored person from residing in a block in which the majority of houses were occupied by white persons, and contained similar restrictions upon white persons when the situation was reversed. The Court said, at page 81:

> "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, *this aim cannot be accom-*

plished by laws or ordinances which deny rights created or protected by the Federal Constitution."

The danger which the Louisville ordinance was designed to avert was by no means fanciful. It was much less remote than any danger to be apprehended, in the absence of particular circumstances, from mere promulgation of the doctrines which New York has defined as "criminal anarchy." The right which the ordinance cut down was not more fundamental than that of free expression with relation to law and government.

In precise accord with these cases is the decision in *Reynolds* v. *United States,* 98 U. S. 145, 163, 164. Waite, C. J., there adopted the statement of the Virginia Toleration Act of 1786 that any "intrusion" by "the civil magistrate" "into the field of [religious] opinion" is necessarily invalid. There is no right in the state "to restrain the profession or propagation of principles on supposition of their ill tendency." "It is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order."

We do not ask this court to go as far in support of the freedom of political expression as in the *Reynolds* case it went in stating the right of religious opinion and expression. The state—as this Court in the Espionage Act and related decisions recognized—may protect itself against danger, while it probably has under our constitutional system no right to protect religion as such. But the measure of its right to protect itself is to be determined by a balancing of the right against the citizen's right to express himself upon matters of

government. The state may, in a word, protect itself against danger of forcible overthrow or breach of the peace, and may punish speech the circumstances of whose utterance are such as to involve a causal relation with substantive evil, consummated, attempted or likely. But a statute which takes no account of circumstances fails, and fails almost as matter of definition, when put to the basic balancing test. For such a statute may be applied and in the instant case was applied to a situation involving no element of public danger. In its relation to such a situation the statute is a mere invasion of an express constitutional right.

The conclusion to which we have come is, we believe, a sound one alike when tested by the decisions of this Court upon the instant question; by the principles of the modern law of England; by the history of the subject; and by the general principles of the law of due process and of the Constitution.

The right of free expression with relation to government is not conditioned upon the wisdom or moderation of its exercise. As Professor Freund has declared, and as the history of the right in our constitutional system (Point IV, *supra*) confirms, that right would be nugatory if it had to stop short of questioning the fundamental institutions of government and of suggesting drastic forms of collective action. The New York Criminal Anarchy Law rests upon the theory of a people subject, not sovereign, and not to be trusted—the theory of the older common law of seditious libel

which even in England has become obsolete. It was the theory of a system which feared, and had reason to fear, the possible revolutionary tendency of extremist doctrines.

In our system, on the other hand, a broad liberty of political expression, except in circumstances of particular danger, is not a menace, but a guarantee. For public opinion is our final authority, and public opinion, to be sound, must take account of every doctrine and advocacy at large in the community, not merely of selected premises. Faith in the ultimate rightness of the people is as cardinal an article as fear of their hasty impulses. The soundness of our institutions is ample security against the general spread of disaffection. It is both safe and beneficial to tolerate disaffection to the point where it actually and proximately endangers the safety of individuals or the public peace.

The right of free expression, more than any other, lies at the base of government by the people. Before that right can be impaired a very compelling public necessity indeed must be shown. The penalization *per se* of doctrine such as the defendant was concerned with is not a means reasonably necessary to the preservation of the public peace and good order, or to the accomplishment of any other end beneficial to the public. It is a palpable invasion of rights secured by the fundamental law. It cuts at the very root of free government. To speak of freedom of political communication of any character as in itself a danger to free government is a contradiction in terms, because if that freedom be curtailed, the democratic processes by which free government is secured will be impaired. The impairment of those processes is harm actual and

present. Harm speculative and remote cannot outweight it. Yet such is the theory of the statute before the Court.

Majorities, in their natural abhorrence of particular advocacies, are apt to attempt unduly to curtail them. The constitutional limitations upon such curtailment have the same quality and purpose as the other constitutional limitations in our system of checks and balances. All of them have primary reference to the dangers of arbitrary and unthinking action by majorities or dominant parties (*Federalist*, Nos. 48, 51 and 78).* Madison wrote to Jefferson in 1788 (*Documentary History of the Constitution*, Vol. V, p. 88):

> "Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents. * * * Wherever there is an interest and power to do wrong, wrong will generally be done, and not less readily by a powerful and interested party than by a powerful and interested prince."

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* President Taft summarized this feeling of the founders of our government in his Message of August 15, 1911, upon the proposal to admit Oklahoma to the Union with a constitutional provision for the recall of judges: "Constitutions are checks upon the hasty action of the majority. They are the self-imposed restraints of a whole people upon a majority of them to secure sober action and a respect for the rights of the minority. * * * In order to maintain the rights of the minority and the individual and to preserve our constitutional balance we must have judges with courage to decide against the majority when justice and law require."

The constitutional checks upon interference by the states with rights of their citizens inherent in the nature of free government (see *Twining* v. *New Jersey*, 211 U. S. 78, 99, 102, and cases there cited) were given federal protection by the Fourteenth Amendment.

Since the statute is unconstitutional, the conviction of the plaintiff-in-error should be reversed and the indictment dismissed.

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